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ADMINISTRATION.

1. PROBATE COURTS HAVE NO EQUITABLE JURISDICTION. The probate court has no jurisdiction of matters of purely equitable cognizance connected with the administration of estates. Hence, when the object of a suit is to follow a trust fund through many transformations during a long series of years, the circuit court is the proper forum, though the delinquent trustee be dead and his estate in the hands of an administrator. *Butler v. Lawson*, 227.

2. STATUTE OF LIMITATIONS. The statute of limitations does not begin to run against the estate of a deceased person on a cause of action accruing after his death, until an administrator has been appointed. *Ib.*

ORDER OF PROBATE COURT, NOT COLLATERALLY QUESTIONABLE, WHEN. If an order of the probate court revoking an administrator's letters shows upon its face all the facts necessary to confer jurisdiction on the court, its validity cannot be questioned in an action brought by the administrator *de bonis non* against the removed administrator to recover assets not accounted for. *Scott v. Crews*, 261.

4. REVOCATION OF LETTERS. The probate court does not lose the power of revoking the letters of a delinquent administrator who fails to make settlement after being duly cited, by omitting to exercise the power at the term to which the citation is returnable. It may continue the settlement to a subsequent term, and if he is still in default, may then revoke them. *Ib.*

5. ADMINISTRATION DE BONIS NON. The power of the probate court to appoint an administrator *de bonis non*, is not limited to cases where debts remain unpaid. Such an administrator may be appointed and may maintain an action against his predecessor as well in cases where there are no debts and the rights of heirs and distributees alone are to be protected. *Ib.*

6. INTEREST. An administrator sold property of the estate on credit, receiving notes of solvent persons bearing interest at ten per cent. Some of these notes were paid. The makers of the others remained solvent for several years, and there was no reason why the estate might not have been settled during that time. It remained open, however, and at a forced settlement made fifteen years afterward, the court charged the administrator with interest at ten per cent per annum with three rests. *Held*, correct. *Held*, also, that for money paid out for the estate, he should be allowed interest at the same rate with the same rests. *Ib.*

7. SETTLEMENT. If an administrator pays off a distributee, or buys up his interest in the estate, and afterward an action is brought against him by an administrator *de bonis non* to recover assets not accounted for, he should, in such action, be credited with the amount of such interest. *Ib.*

8. FRAUD IN FINAL SETTLEMENT. This court is of opinion that an item of credit allowed an administrator on his final settlement was false and fraudulent, and, therefore, affirms a judgment setting aside the settlement. *Byerly v. Donlin*, 270.

9. DE BONIS NON. The circuit court has no power, upon setting aside the final settlement of a deceased administrator, to order his administrator to settle the estate. It is for the probate court to appoint an administrator *de bonis non* for this purpose. *Ib.*

10. PROBATE OF WILL. Probate of a will can only be granted by the court. Proof may be taken by the clerk or a judge of the court, but subject to confirmation or rejection by the court. Unless there is a confirmation, appropriately evidenced by an order to that effect, the will is not probated. *Smith v. Estes*, 310.

11. ADMINISTRATOR'S ANNUAL SETTLEMEMT, NOT CONCLUSIVE. The annual settlements of an administrator are not conclusive on creditors, but may be reviewed and corrected at their instance on final settlement. *Ritchey v. Withers*, 556.

12. APPLICATION OF PROCEEDS OF SALE OF LANDS. The proceeds of the sale of lands of a decedent cannot be used to make good a deficiency in the widow's allowance, nor to reimburse the administrator for improvements put upon the land, nor for any other purpose than the payment of debts. See *Drowry v. Bauer*, 68 Mo. 155. *Ib.*

13. NUNC PRO TUNC ORDERS. If there is a discrepancy between the judgment of the probate court allowing a demand against the estate of a decedent and the entries made by the clerk on the back of the demand and in the book of abstracts of allowances, the latter may, by a *nunc pro tunc* order, be made to conform to the judgment. *Ib.*

14. ADMINISTRATOR'S INFORMAL DEED: EJECTMENT. If an administrator's deed to land sold for the payment of debts of his intestate, be wanting in formality, (as, if it lack a seal, or be not properly acknowledged and certified,) it will still vest in the purchaser at least an equitable title; and if the facts are properly pleaded, will constitute an equitable defense to an action of ejectment brought by the heirs of the deceased against one claiming under it. *Snider v. Coleman*, 568.

15. WIDOW'S ALLOWANCE, HUSBAND DYING CHILDLESS: MAY CLAIM A SEWING MACHINE. If a man die without children, his widow will be entitled to take as her absolute property the articles allowed her by section 33, article 2 of the administration act, (Wag. Stat., p. 88,) whether she elects to take her dower, or the half of his estate as allowed by section 5 of the dower act, (Wag. Stat., p. 539). A sewing machine is one of the implements of industry which she may claim under section 33. *The State ex rel. Steers v. Taylor*, 656.

ADVERSE POSSESSION.

1. POSSESSION OF LAND, AS NOTICE OF OCCUPANT'S CLAIM OF TITLE. One who has knowledge of the fact that land is in the actual possession of another, is thereby put upon inquiry as to the rights of the occupant, and if he purchases, will be held to take with notice of those rights. *Martin v. Jones*, 23.

2. DEED: NOTICE OF TITLE: RAILROAD. A railroad company, under an unrecorded license from the owner, surveyed, located and partly graded its road across a tract of land, and then suspended work. The owner afterward executed a mortgage, which covered the strip appropriated by the company, to a person who had no actual notice of the company's rights or of the work done. *Held*, that he was not bound by the license. *Masterson v. The West End Narrow Gauge Railroad Company*, 342.

3. THE rule laid down in *Turner v. Hall*, 60 Mo. 275, and *Crispen v. Hannavan*, 50 Mo. 550, in relation to interruption of adverse possession, is re-affirmed. *Bartlett v. O'Donoghue*, 563.

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AFFRAY.

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APPEAL.

1. APPEAL FOR APPEAL SWORN TO BY AGENT. An affidavit for appeal made by one not a party to the suit, need not show upon its face that the affiant is the appellant's agent. If this fact appears by a deposition read in the case it will be sufficient. *Melcher v. Scruggs*, 406.

2. STATE'S APPEAL. The State has no right of appeal in a case where, on motion made *ore tenus* to exclude evidence, the trial court holds the indictment bad, and on that ground enters judgment for defendant. *The State v. Risley*, 609.

3. APPEAL BOND. The statute is express that in cases where an appeal bond is required before the order granting the appeal shall stay execution, the bond must be filed during the term at which the judgment is rendered. A bond filed in vacation, though in pursuance of an order made at the term, will be of no effect. *Long v. Dismer and McEntee*, 655.

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ATTACHMENT.

1. THE AFFIDAVIT: SHERIFF'S DEED. If the affidavit for an attachment is not signed by the affiant, the court acquires no jurisdiction, and a sheriff's deed based upon a judgment in the case is a nullity. SHERWOOD, C. J., and NORTON, J., dissent. *Hargadine v. Van Horn*, 370.

2. INTERPLEA IN ATTACHMENT: VERDICT. Upon the trial of an interplea in attachment, the verdict must be responsive to the issue presented, viz: whether the property attached was the property of the interpleader. A mere money verdict in favor of the interpleader will not do, even where the property has been sold and the proceeds are in the hands of the sheriff. *Hewson v. Tootle*, 632.

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BILL OF EXCEPTIONS.

1. THE BILL OF EXCEPTIONS may be filed as well after as before the allowance of the appeal. *The State v. Dodson*, 283.

2. EXCEPTIONS TO EVIDENCE. Unless exceptions to the rulings of the trial court on questions of evidence are preserved in the bill of exceptions, this court will not consider them. *The State v. Greenwade*, 298.

3. BILL OF EXCEPTIONS: JUROR. Where the bill of exceptions purports to give the statements made by the jurors upon their examination on the *voir dire*, this court will not consider affidavits filed more than five days after the trial setting forth other statements. If the bill of exceptions, as allowed by the judge, is untrue, counsel should have one signed by by-standers and filed within five days, as prescribed by section 3641, Revised Statutes. *Ib.*

4. THE signature of the judge of the trial court is essential to a bill of exceptions. This court will not notice an unsigned bill. *Garth v. Caldwell*, 622.

5. A party intending to appeal presented to the judge of the trial court a bill of exceptions which the judge refused to sign. To this

refusal an exception was taken and another bill of exceptions was tendered, wherein was incorporated the former bill. The judge signed the second bill. *Held*, that this did not bring up for review the questions designed to be raised by the original bill. The exceptor's remedy, if the trial term had not lapsed, was to have the original bill signed by by-standers; if it had lapsed, a proceeding by mandamus to compel the judge to sign. *Ib.*

BRIBERY

OF THE PUBLIC BY CANDIDATE FOR OFFICE. It is unlawful for a candidate for public office to make offers to the voters to perform the duties of the office, if elected, for less than the legal fees. An election secured by means of such offers is void. *The State ex rel. Attorney General v. Collier*, 13.

CAPE GIRARDEAU.

SEE MUNICIPAL CORPORATION.

CASHIER'S BOND.

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CONFLICT OF LAWS.

1. TOWNSHIP BONDS: CONFLICTING DECISIONS OF STATE AND FEDERAL COURTS: COMPROMISE OF BONDS. Notwithstanding this court holds the act of March 23rd, 1868, authorizing the issue of township bonds, unconstitutional, and bonds issued thereunder, void, yet since the courts of the United States hold the contrary, such bonds cannot be deemed such absolute nullities as not to be the subject of compromise. *The State ex rel. Stamper v. Holladay*, 499.

2. ———: POWER TO COMPROMISE UNDER ACT OF 1877. The act of April 12th, 1877, (Sess. Acts, p. 197,) providing for the compromise, purchase or redemption of municipal indebtedness, while it could not

be construed to authorize the compromise of bonds issued without any color of authority, and manifestly creating no debt or obligation which the municipality is bound to pay either in law or equity, will not, on the other hand, be limited to unquestionable claims, but will be construed to include bonds in respect to whose validity courts of co-ordinate jurisdiction differ, such as the township bonds issued under the act of 1868. *Ib.*

3. STATUTE LAW OF SISTER STATES: COMMON LAW. This court cannot take judicial notice of the statutes of another state; neither can it presume that the common law prevails in a state, such as Texas, which was never subject to the laws of England. Where, therefore, a contract comes in question, the validity of which is properly determinable by the law of such a state, if no evidence is offered to show what the law of that state is, resort must be had to the law of this state to determine the question. *Flato v. Mulhall.* 522.

CONSPIRACY.

CONSPIRACY TO ROB: ROBBERY OF WRONG MAN BY MISTAKE. If parties enter into a conspiracy to rob one person, and, by mistake, some of the conspirators rob another, or assault him with intent to rob under the belief that he is the person intended, and one of the conspirators who was not present being subsequently advised of the facts, assents to them and participates or acquiesces in the result, he becomes equally liable with the others. *The State v. Greenwade,* 298.

CONSTITUTIONAL LAW.

1. VENUE OF INDICTMENT: CONSTITUTIONAL LAW. Under the present constitution, (art. 2, § 12,) an indictment for felony can be found, as at common law, only in the county in which the offense was committed. Section 1804, Revised Statutes, which undertakes to authorize the grand jury of another county, under certain circumstances, to find the indictment is, therefore, unconstitutional and void. A person confined by virtue of a warrant issued upon an indictment found under this section is illegally imprisoned, and will be discharged upon *habeas corpus. Ex Parte Slater,* 102.

2. SPECIAL ASSESSMENTS FOR MUNICIPAL IMPROVEMENTS. The provisions in the constitution of 1875, relating to the uniformity and equality of taxation, and the taking of private property for public use, were not intended to apply to, and do not effect any change in, the law as to the right of municipal corporations to make special assessments for local improvements. *Adams v Lindell,* 198.

3. MUNICIPAL ORDINANCE; WORK ON STREETS. A town charter authorized the town to require all male citizens between the ages of twenty-one and fifty to work on the streets. An ordinance was passed by the council imposing this duty only upon those between twenty-one and forty-five. *Held,* that it was not void because it did not include those between forty-five and fifty. *The Town of Tipton v. Norman,* 380.

CONTEMPT.

COMPULSORY PRODUCTION OF TELEGRAPHIC MESSAGES IN COURT: LIABILITY OF COMPANY'S AGENT TO PUNISHMENT FOR REFUSAL. Telegraphic messages in the possession of the officers of the company, are not privileged communications. No act of Congress puts them on the same footing with the mails; and no statute of the State or principle of law gives them any different standing from that occupied by any communication made by one through another to a third party, with respect to the liability of the confidant to be called as a witness to produce it or testify to it. The agent of a telegraph company may, therefore, be compelled by proper process to produce such messages before the grand jury; and no rule of the company can excuse him from liability to punishment for refusal so to do. *Ex Parte Brown*, 83.

CONTRACT.

1. CONTRACT OF PERSON OF UNSOUND MIND. An exchange of property made by a person of mind so unsound, that the want of mental capacity is apparent to any one of ordinary prudence and observation conversing with him, is of no validity. A guardian subsequently appointed may recover the property of the insane person without tendering back that received by him in the exchange. *Halley v. Troester*, 73.

2. CONTRACT FOR THE BENEFIT OF A THIRD PARTY: MARRIED WOMAN. One C, in anticipation of his own death, sold a carriage, agreeing with the purchaser that the price was to be paid in farm produce to his (C's) wife. C having died; *Held*, that his widow, and not his executor, was entitled to the benefit of the sale. *Scruggs v. Alexander*, 134.

3. PROMISSORY NOTE: RATIFICATION. If the maker of a note payable to A and indorsed by B as surety with the understanding that it is to be discounted by A, procures it to be discounted by C instead, B cannot on this ground, resist recovery by C or any one claiming under him, if, after the discount, with a full knowledge of all the facts, he either expressly or impliedly promised to pay the note. *The Mastin Bank v. Hammerslough*, 274.

4. PAROL PROMISE TO ACCEPT DRAFT. The payee of a draft cannot enforce against the drawee a parol promise to accept. R. S. 1879, § 537. *Flato v. Mulhall*, 522.

5. CONTRACT, IN FORM JOINT, WHEN SEVERAL: PARTY TO SUIT: COVENANT OF INDEMNITY. Where a contract with two or more persons, though in form joint, is founded upon a separate consideration moving from each, and there is nothing to exclude the inference that it was intended to be several, it will be so construed, and any one of the parties may maintain an action on it for a breach affecting himself only. Thus, where one of the sureties in an official bond covenanted to indemnify his co-sureties against liability on the bond, and one of the latter was compelled to pay part of a defalcation of the principal; *Held*, that he could sue alone upon the covenant. *Cross v. Williams*, 577.

6. PLEADING: CONTRACT. In declaring upon a contract it is only nec-

essary to state so much of it as relates to the point of which complaint is made; beyond that it is useless to go. But the omission of any part of the contract which materially qualifies and alters the legal nature of the promise which is alleged to have been broken, will be fatal. *Moore v. Mountcastle*, 605.

7. CONTRACT: MEASURE OF DAMAGES: PLEADING. In an action for breach of contract to come from Tennessee to Missouri to work on defendant's farm, plaintiff may recover for loss of time and the actual expense incurred in coming, without any specific allegation of such damages in his petition. *Ib.*

8. CONTRACT: ACCEPTANCE, NO WAIVER WITHOUT KNOWLEDGE. Mere acceptance of, and payment for a bridge built under contract, does not waive any defect in the work, of which the acceptor is at the time ignorant. There must be both knowledge and acquiescence to constitute waiver; and it devolves upon the contractor to show such knowledge. *Johnson County v. Lowe*, 637.

9. OBLIGATION PAYABLE ON DEMAND: DELAY IN DEMAND CONTEMPLATED BY THE CONTRACT: STATUTE OF LIMITATIONS. Where delay in making demand is contemplated by the express terms of an obligation payable on demand, there is no rule of law which requires that the demand be made within the statutory period for bringing an action. Thus, where an obligation for the payment of money one day after date, contained a condition that if the payee should demand payment during her natural life, it should be due and payable; but in case of her death before any or all of the debt should be paid, it should not be paid at all; *Held*, that a demand made by the payee more than ten years after the date of the paper was in time, and that an action brought immediately thereafter, was not barred by limitation. *Jameson v. Jameson*, 640.

A LOTTERY CONTRACT CONSTRUED. See The State *ex rel.* The Attorney General v. France, 41.

CONTRACTS OF DE FACTO OFFICERS, VALID. See Adams v. Lindell, 198.

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CONVERSION.

EVIDENCE. In an action against a corporation for the conversion of certain staves, defendant offered evidence that they were cut from land owned by the president of the corporation, in connection with evidence that the president had directed the taking of them. There was no evidence that he had not granted permission to plaintiffs to cut the staves, and no other evidence that they belonged to him. *Held*, that the offer was properly rejected. *Allen v. The St. Louis, Iron Mountain & Southern Railway Company*, 386.

CORPORATIONS.

1. NATIONAL BANKS: DEALINGS BEYOND THEIR CORPORATE POWERS. The maker of a non-negotiable note discounted with a national bank cannot question the right of the bank to recover on it, on the

ground that national banks have no right to deal in that kind of paper. *First National Bank of Trenton v. Gillilan*, 77.

2. How liability as stockholder may be assumed. One may render himself liable as stockholder in a corporation as well by his conduct in respect to the stock of the corporation, as by formal subscription and acceptance of stock. *Griswold v. Seligman*, 110.

3. Case adjudged. Accordingly, where defendants advanced money to a corporation, and to secure the advances, received from the corporation a certificate for a majority of its capital stock, which was absolute and unconditional on its face, but was to be held by them "in trust" as declared by a resolution of the board of directors, or "in escrow," as it was expressed in an entry on the stock book of the corporation; and while so holding the stock, defendants voted it at one election and thus elected the directors and other officers, and thereby obtained complete control of the corporation; *Held*, that they were estopped to deny that they were stockholders, and were liable as such, both to the corporation and its creditors; and this so far as the creditors were concerned, whether they became such before defendants had so treated the stock or not.

Norton, J., dissenting, denied that there was any liability.

Henry, J., agreed that defendants were liable to creditors, but denied any liability to the corporation. *Ib.*

4. Parol evidence to modify written contract. Where stock is held under a written contract, as security for advances, it is not competent to show that there was a verbal understanding that the bailees were to have the privilege of voting the stock. *Ib.*

5. Pledge of stock: pledgee's liability. Section 9, page 301, Wagner's Statutes, in relation to railroad companies, provides that "no person holding stock in any such company * * as collateral security, shall be personally subject to any liability as a stockholder of such company; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly." *Held*, that this section has no application to stock which has not been issued in the usual course of business, and, therefore, does not exempt from liability a person holding as collateral security unsubscribed stock issued to him by the company. Norton, J., dissenting. *Ib.*

6. Fraudulent attempt of directors to release stockholders. The board of directors of an insurance company knowing that their company had just been reported by an official examiner to the Superintendent of the Insurance Department as being in an unsound condition, and that that officer would probably institute legal proceedings to have the company wound up, passed a resolution to the effect that all stockholders who would pay five per cent on their stock, (on which ninety per cent was unpaid,) and would surrender their stock certificates to the company, should have the privilege of retiring from the company, and withdrawing their stock notes. If all the stockholders had acted on this resolution, the company would have had the means of paying about one-half its ascertained liabilities, and no more, with no provision for its outstanding policies. *Held*, that the resolution was a fraud in law, if not in fact, upon the creditors of the company, and was no protection, as against them, to those stockholders who had availed themselves of its provisions. *Gill v. Balis*, 424.

7. DIRECTORS CANNOT REDUCE CAPITAL STOCK. The board of directors of a corporation have no power to diminish the capital stock of the corporation unless authorized by a vote of the stockholders. *Ib.*

8. WITHDRAWAL OF STOCK. An attempt on the part of a portion of the stockholders of a corporation to withdraw from the corporation before all its debts are paid, by canceling their stock, will be none the less void because enough remain to meet the claims of creditors. *Ib.*

9. LIABILITY OF UNDISCLOSED PRINCIPAL: ABORTIVE CORPORATION. If an agent authorized to execute a promissory note, executes it in his own name, whether he discloses his agency or not, his principal may be sued on the note, unless it is clear that both parties to the note intended that the agent alone should be liable; and parol evidence is admissible to prove the intent.

In this case members of a Masonic Lodge which had made an abortive attempt to become incorporate, were held liable upon a note executed by the officers of the lodge for the purposes of the lodge, with the approval of the members. *Ferris v. Thaw*, 446.

10. CORPORATION: LEGALITY OF ORGANIZATION CANNOT BE QUESTIONED BY STOCKHOLDER. A stockholder in a corporation cannot escape liability upon his stock note by showing that the corporation was not organized in strict conformity to law, as for example, by showing that instead of the cash payment required by law to be made by all subscribers of stock, the corporation had accepted notes secured by mortgage on real estate. *The Home Stock Insurance Company v. Sherwood*, 461.

11. ———: IRREGULAR TRANSFER OF STOCK: STOCK NOTE. Equity will protect the claims of the holder of stock irregularly transferred, and if the corporation goes into liquidation, will authorize it to enforce a stock note given by the transferrer in payment of the stock in order to provide means for its redemption. *Ib.*

12. ———: TRANSFER NOT IMPEACHABLE BY TRANSFERRER. One who has transferred a stock certificate for value, cannot afterward, in his own defense, object to the transfer on the ground that it was not made in the mode prescribed by the by-laws or charter. *Ib.*

13. NUNC PRO TUNC ORDERS: CORPORATION. A judgment against a corporation cannot be corrected *nunc pro tunc* by striking out the name under which the defendant was sued and served with process, and substituting another name. *Brown v. The Terre Haute & Indianapolis Railroad Company*, 567.

14. SAVINGS BANKS: POWER TO REQUIRE CASHIER TO GIVE BOND. Any savings bank may enact a by-law requiring its cashier to give bond for the faithful performance of the duties of his office. Such enactment would be but a reasonable exercise of the power conferred by statute on all corporations, of making by-laws, not inconsistent with existing law, for the management of their property, the regulation of their affairs, etc. Wag. Stat., p. 289, § 1. *The Savings Bank of Hannibal v. Hunt*, 597.

15. CASHIER'S BOND: NON-LIABILITY OF SURETIES AFTER RE-ELECTION. One H. gave bond as cashier of a savings bank. The bond was silent as to the term of his office, and as to the period for which the sure-

ties were to be liable thereon. A statute in force at the time made the term of the cashier and other officers of such banks "one year, and until their successors are duly elected and qualified." The statute prescribed no qualification for a cashier except that he should be a member of the board of directors. A by-law did, however, require him to give bond for the faithful performance of his duties. H. was re-elected cashier at two successive annual elections, and continued to discharge the duties of the office, but gave no new bond. During the third year of his cashiership he became defaulter. *Held*, that his sureties were not liable for the defalcation. The bond was not in force when it occurred. *Ib.*

COSTS.

1. IN CRIMINAL CASES: WITNESS FEES. The judge and prosecuting attorney connot be compelled to certify for payment a bill of fees for witnesses summoned by the defendant in a criminal case, beyond a number ascertained by allowing three witnesses for each fact necessary to be proved by the defendant in his defense. Acts 1874, p. 27, § 25. *The State ex rel. Dalton v. Hill*, 512.

2. AFTER-ENACTED STATUTE. The prohibition contained in section 2116, Revised Statutes, against taxing the State with the costs of witnesses unnecessarily summoned and not examined, applies to a case where such costs accrued but were not taxed prior to the enactment of that section. *Ib.*

3. TAXATION OF, IN CIRCUIT COURT AFTER FINAL DISMISSAL OF CAUSE BY THIS COURT: ALLOWANCE TO RECEIVER. Pending an appeal from a decree of the circuit court placing the railroad and other property of the defendant in the hands of a receiver, a stipulation for dismissal of the cause, signed by the parties, was filed in this court and the cause was accordingly dismissed, the order providing that neither party should recover costs as against the other, except that the costs of the appeal should be equally divided between them. Afterward, on motion of the receiver in the circuit court, that court made him an allowance for his services, and ordered that the same be taxed as costs, one-half to be paid by defendant. On appeal from this order; *Held*, that if carried into effect it would annul the former decree of this court as to costs. It was, therefore, reversed. *Semble*, that the circuit court had power to make the allowance, and to order the same to be taxed as costs, but no power to enter a judgment against either party for any portion of such costs. As to this, however, HOUGH, J., was of a different opinion, holding that after the dismissal of the suit by this court, the circuit court had no power to make any allowance to the receiver. *Morse v. The Hannibal & St. Joseph Railroad Company*, 585.

ATTORNEY'S FEES AS COSTS IN TAX CASES. See The City of Cape Girardeau v. Riley, 220.

COUNTY AGENT.

APPOINTMENT OF COUNTY AGENT: RATIFICATION OF VERBAL APPOINTMENT. Though the law may require the appointment of an agent for the transaction of county business to be made by order of record in the county court, yet a contract made by an agent acting under a mere

verbal appointment, if subsequently ratified and approved by an order of record, will notwithstanding the irregularity, be as binding upon the county as if the appointment had been properly made in the first instance. *Walker v. Linn County*, 650.

COUNTY BONDS.

1. RAILROADS: POWER OF COUNTY COURTS TO SUBSCRIBE STOCK. The act of March 23rd, 1861, (Sess. Acts, p. 60,) withdrew the power conferred on the county courts by the charter of the Laclede & Fort Scott Railroad Company, (Sess. Acts 1859-60 p. 434,) to subscribe to the stock of that company without first submitting the question to a vote of the peop e.

NAPTON AND HOUGH, JJ., dissented, holding that both upon a true construction of the statutes in question, and upon the principle *stare decisis*, the decision should have been otherwise. A similar point was otherwise decided in *Smith v. Clark Co.*, 54 Mo. 58. *The State ex rel. Barlow v. The Dallas County Court*, 329.

2. TOWNSHIP BONDS: CONFLICTING DECISIONS OF STATE AND FEDERAL COURTS: COMPROMISE OF BONDS. Notwithstanding this court holds the act of March 23rd, 1868, authorizing the issue of township bonds, unconstitutional, and bonds issued thereunder, void, yet since the courts of the United States hold the contrary, such bonds cannot be deemed such absolute nullities as not to be the subject of compromise. *The State ex rel. Stamper v. Holladay*, 499.

3. ——: POWER TO COMPROMISE UNDER ACT OF 1877. The act of April 12th, 1877, (Sess. Acts, p. 197,) providing for the compromise, purchase or redemption of municipal indebtedness, while it could not be construed to authorize the compromise of bonds issued without any color of authority, and manifestly creating no debt or obligation which the municipality is bound to pay either in law or equity, will not, on the other hand, be limited to unquestionable claims, but will be construed to include bonds in respect to whose validity courts of co-ordinate jurisdiction differ, such as the township bonds issued under the act of 1868. *Ib.*

COUNTY BUILDINGS.

INSURANCE OF COUNTY BUILDINGS. The county courts have power to enter into contracts for the insurance of county buildings against fire or lightning. *Walker v. Linn County*, 650.

COUNTY CLERK.

ELECTION: COUNTY CLERK'S DUTY IN CERTIFYING RETURNS. The clerk of the county court must certify to the Secretary of State, the vote in the several precincts, as it is certified to him by the judges and clerks of election. He has no right to refer to the poll books and tally sheets sent in by them, for the purpose of verifying or correcting their certificates. If they have made a mistake in casting up the votes, the error can only be corrected by the tribunal authorized to determine contested elections. *Mayo v. Freeland*, 10 Mo. 629. *The State ex rel. Ford v. Trigg*, 365.

COUNTY TREASURER.

1. His bond as custodian of school moneys. The separate bond required by section 42, page 1251, Wagner's Statutes, to be given by the county treasurer as custodian of school moneys, need not specify those moneys. The condition prescribed by section 42 is, that the treasurer "will faithfully disburse and pay over according to law all such funds and moneys as may from time to time come into his hands as such treasurer." The sureties in a bond so conditioned will be liable for any school moneys received and not accounted for by the treasurer. *The State ex rel. Brawford v. Cook*, 496.

2. Township school moneys. In an action against a county treasurer on his school bond to recover moneys not accounted for, he is not entitled to credit for sums paid, on warrants of the county clerk, to the clerk of any township in excess of the amount received by him for that township. *Ib.*

COUNTY WARRANT.

County, when liable for warrant on special fund. While a county is ordinarily not liable as for a general debt, upon a warrant drawn against a special fund, yet if it diverts the money of that fund from the payment of the warrant and uses it for other purposes, it becomes liable. *Valleau v. Newton County*, 593.

COURTS.

1. Probate courts have no equitable jurisdiction. The probate court has no jurisdiction of matters of purely equitable cognizance connected with the administration of estates. Hence, when the object of a suit is to follow a trust fund through many transformations during a long series of years, the circuit court is the proper forum, though the delinquent trustee be dead and his estate in the hands of an administrator. *Butler v. Lawson*, 227.

2. Special judge: practice, criminal. A conviction before a special judge will not be set aside on the ground that the defendant's affidavit of prejudice on the part of the regular judge was not supported by the oaths of two or more reputable persons, as required by statute, unless this objection was taken at the time in the trial court. *The State v. Dodson*, 283.

3. Adjourned terms. In order to make an adjournment of court a final adjournment of the term, it is not essential that the order shall declare that the adjournment is to court in course. If it be to the day fixed by law for the beginning of the next regular term, it will put an end to the current term, whatever may be the language used. An adjourned term cannot be held on a day fixed by law for the beginning of a regular term. *The State ex rel. Simms v. Todd*, 288.

4. Disqualification of judge for prejudice. Section 1877, Revised Statutes, which provides that the judge of any court in which any criminal prosecution shall be pending, shall be incompetent to try the case, if the defendant shall file his affidavit supported by the affidavits of two reputable persons not of kin to or coun-

sel for him that the judge will not afford him a fair trial, applies only to the regular judge. After the defendant has thus disqualified the regular judge, and the judge of another circuit has been called in under section 1881, Revised Statutes, to try the case, he cannot be disqualified in the same way. *The State v. Greenwade*, 298.

5. PAROL EVIDENCE: COUNTY COURT RECORDS. In an action on a bond given by a contractor for the construction of a county bridge, parol evidence of a conversation between the contractor and the justices of the county court is admissible for the purpose of showing that an order of record for the issuing of a warrant in payment for the bridge was not intended as a waiver of the county's right to enforce the bond in case defects should afterward appear in the bridge. The rule that the county court can speak only by its record, does not apply to such a case. *Johnson County v. Lowe*, 637.

COURTESY.

PETITION, WHEN DEMURRABLE: STATUTE OF LIMITATIONS: TENANCY BY COURTESY. If it is impossible to determine from the allegations of the petition whether or not the plaintiff has a cause of action, a demurrer will lie.

Hence, where an action was brought to set aside a deed executed twenty-six years before, and the petition showed that plaintiff's mother, through whom she claimed title, was a minor at the date of execution of the deed, and married and died a minor, leaving plaintiff her only heir, but failed to show whether plaintiff's father survived her mother or not; *Held*, that if the father was still living he was tenant by courtesy, and plaintiff could not maintain her action. If he died before the mother, the action was barred by limitation. If he survived her, but was dead when the action was brought, it was not necessarily barred. For want of a proper allegation as to survivorship, therefore, the petition was demurrable. *Embree v. Patrick*, 173.

CRIMINAL LAW.

1. VENUE OF INDICTMENT: CONSTITUTIONAL LAW. Under the present constitution, (art. 2, § 12,) an indictment for felony can be found, as at common law, only in the county in which the offense was committed. Section 1804, Revised Statutes, which undertakes to authorize the grand jury of another county, under certain circumstances, to find the indictment is, therefore, unconstitutional and void. A person confined by virtue of a warrant issued upon an indictment found under this section is illegally imprisoned, and will be discharged upon *habeas corpus*. *Ex Parte Slater*, 102.

2. SPECIAL JUDGE: PRACTICE, CRIMINAL. A conviction before a special judge will not be set aside on the ground that the defendant's affidavit of prejudice on the part of the regular judge was not supported by the oaths of two or more reputable persons, as required by statute, unless this objection was taken at the time in the trial court. *The State v. Dodson*, 283.

3. INDICTMENT FOR EMBEZZLEMENT: AVERMENT OF AGENCY. An indictment for embezzlement framed under section 35, page 458, Wag-

ner's Statutes, need not directly aver the defendant's agency; it is sufficient if the agency distinctly appears. *Ib.*

4. EMBEZZLEMENT. Under an indictment charging embezzlement of horses, it is error to admit evidence or to instruct the jury in regard to embezzlement of the proceeds of the horses. *Ib,*

5. PRACTICE, CRIMINAL: INSTRUCTIONS. If a jury in a criminal case assess against the defendant a punishment authorized by law for the crime with which he is charged, it will be no ground for setting aside the verdict, that the court in its instructions under-stated the maximum punishment permitted, and authorized the jury to impose other punishments not permitted by law. *The State v. Gann*, 374.

6. ——: REASONABLE DOUBT: EVIDENCE. An instruction defined a reasonable doubt to be "a real, substantial and well founded doubt, and not a mere possibility that the defendant is innocent;" and added that "the testimony of one witness, if true, is sufficient to warrant a conviction." *Held*, no error. *Ib.*

7. MUNICIPAL CORPORATION: POWER TO IMPOSE PENALTIES. The power to require work to be done upon the streets as by ordinance the council may prescribe, implies the power of imposing penalties for a failure to work. *The Town of Tipton v. Norman*, 380.

8. FUGITIVE FROM JUSTICE: COMPLAINT FOR HIS ARREST, MUST SHOW WHAT. The complaint required by section 5706, Revised Statutes, to be filed before a warrant can be issued for the arrest of a person as a fugitive from justice from another state, must show that he has been guilty of some crime against the laws of that state: and this may be either by direct averment, or by stating facts which constitute a crime at common law. If there be no direct averment of a crime, and the facts stated do not constitute one at common law, (as, for example, the obtaining money under false pretenses,) the officer acquires no jurisdiction, and his warrant will be void. A statement that the act was committed feloniously and against the peace and dignity of the state where it occurred, will not be sufficient. *The State v. Swope*, 399.

9. RECOGNIZANCE. A recognizance given by one in custody under an illegal warrant, is involuntary, and cannot be enforced against him or his sureties. *Ib.*

10. ATTEMPT TO STEAL: ATTEMPT TO ROB. The defendants having been convicted of an attempt to commit larceny; *Held*, that the judgment must be reversed, the evidence showing an attempt to commit robbery rather than larceny. *The State v. Craft*, 456.

11. ARRAIGNMENT. This case is reversed because the record fails to show that the prisoner was arraigned. *The State v. Billings*, 662.

EVIDENCE OF ONE OFFENSE ON TRIAL FOR ANOTHER. See The State v. Greenwade, 298.

CROPS.

1. REPLEVIN: CROPS. Corn in the stalk is the subject of replevin;

and this without regard to whether it is growing, or, having matured, has ceased to derive any nourishment from the soil. *Garth v. Caldwell*, 622.

2. JUDICIAL NOTICE: CROPS. The courts will take judicial notice that corn is mature in the month of December. *Ib.*

DAMAGES.

1. PRIVATE NUISANCE: DAMAGES. Where the owner knowingly permits a brothel to be established and maintained in his house, which adjoins a tenement of another, by reason of which the latter's tenants leave, and his property is depreciated in value, the former is liable to the latter for the special damage thereby caused him, over and above the wrong and injury done to the general public. *Givens v. Van Studdiford*, 129.

2. ———: MEASURE OF DAMAGES. In such a case the measure of damages is the difference in the selling value of the property and the loss of rent occasioned by such nuisance. *Ib.*

3. ———: ———: EVIDENCE OF DAMAGE. In ascertaining these facts, all circumstances that would show a depreciation in value should be considered, and the damage recovered must be the actual depreciation shown to be caused by the existence of the nuisance. *Ib.*

4. ———: ———. Where it is shown that, after defendant's house was occupied as a brothel, other houses of the same character were opened in the same neighborhood, so that the damage caused by others cannot be separated from that caused by defendant, he will be liable for all such damage, if the natural and probable consequence of his illegal act was to cause the injury complained of. *Ib.*

5. WHERE the evidence shows that damages have been sustained in the execution of a contract, but there is no evidence of the amount, and it appears that a specific sum has already been paid as damages, there can be no further recovery. *Noffsinger v. Bailey*, 216.

6. SHERIFF: EXECUTION: DAMAGES. If the attorney for the plaintiff in an execution is misinformed by the sheriff's deputy as to the place of sale, and for that reason fails to attend the sale, and no one is present to protect the plaintiff's interest, in consequence of which property sufficient to pay the debt is sacrificed and plaintiff gets nothing, the sheriff will be liable to the plaintiff for the loss. *The State ex rel. The Central Type Foundry v. Moore*, 285.

7. ———: MUST POSTPONE SALE TO AVOID SACRIFICING PROPERTY. If a sheriff sees that property which he is offering at execution sale is about to be sacrificed, and knows that it was the intention of plaintiff's attorney to be present and protect plaintiff's interest by bidding, but sees that the attorney is absent, and knows that his absence is owing to erroneous information furnished by his own deputy, he should not permit the sale to go on, but should postpone it, and if he fails to do so and the property is sacrificed, he will be liable. *Ib.*

8. IF two parties enter into a joint undertaking, and one of them fails to perform his part of the work, the expense of having it done by another is chargeable to him and not to his partner. *Stegman v. Berryhill*, 307.

9. MEASURE OF DAMAGES FOR EXECUTING UNLAWFUL SEARCH WARRANT. The damages for taking property under an unlawful search warrant, but without violence, are not to be limited by the value of the property. *Melcher v. Scruggs*, 406.

10. MEASURE OF DAMAGES: MECHANICS LIEN: DEED OF TRUST. In the absence of fraud, malice or oppression, the measure of damages for refusal of a purchaser under a deed of trust to permit a purchaser at mechanics lien sale to remove a building erected after the execution of the deed of trust, (as permitted by section 3 of the mechanics lien law, Wag. Stat., p. 908,) is not the value of the building as it stands, but what it would be worth removed from the land. *Seibel v. Siemon*, 526.

11. MEASURE OF DAMAGES: TORT. In an action for wrongfully mining and taking coal, if it appears that the defendant's act was not willful or grossly negligent, the true measure of damages for the coal taken is its value at the mouth of the shaft, less the cost of severing it from the freehold and delivering it at the mouth. *Austin v. The Huntsville Coal & Mining Company*, 535.

12. DAMAGES CAUSED BY ABANDONMENT OF CONDEMNATION PROCEEDINGS. If proceedings are instituted to condemn for public use the property of an individual, and after the value of the property is ascertained by inquest, the proceedings are abandoned because the price assessed is unsatisfactory, the corporation instituting such proceedings will be answerable to the owner for all damages occasioned by them. *Leisse v. The St. Louis & Iron Mountain Railroad Company*, 561.

13. IN an action to recover damages for the institution of proceedings to condemn private property for public use, money need not have been actually paid out to entitle plaintiff to recover; but if a debt has been created by reason of such proceedings, a damage has been incurred for which an action will lie. *Ib.*

14. CONTRACT: MEASURE OF DAMAGES: PLEADING. In an action for a breach of contract to come from Tennessee to Missouri to work on defendant's farm, plaintiff may recover for loss of time and the actual expense incurred in coming, without any specific allegation of such damages in his petition. *Moore v. Mountcastle*, 605.

DEEDS.

1. DESCRIPTION BY REFERENCE TO ANOTHER DEED. It is no objection to a deed that it does not describe the land conveyed, if it refers for description to the book and page of a record where another deed is recorded which does describe it. *Clamorgan v. The Baden & St Louis Railway Company*, 139.

2. DESCRIPTION: CALL FOR "THE HILLS" HELD TO PREVAIL OVER CALL FOR DISTANCE. A deed executed in 1810 described the southern boundary of the tract conveyed as "twenty arpens in depth from east to west, that is to say from the river Gingras to the hills." Actual measurement subsequently made showed that the distance from the river to the hills was twenty-five arpens. In 1807 the Board of United States Commissioners had confirmed to the grantor in this deed all the land lying between the river and the

land of one S., which lay in the hills. In several conveyances subsequent to 1810 both the grantor and the grantee, under whom respectively the parties to this suit claimed, recognized the southern boundary as it was described in the deed of that date, invariably calling for the hills as the western terminus of the line. *Held*, that although the call for "the hills" might otherwise have been too indefinite, yet, effect must be given to the studied repetition of that call in all the deeds, and it must prevail over the call for twenty arpens. The deed of 1810 was, therefore, construed as conveying all the land between the river and the land of S. in the hills. *Ib.*

3. SHERIFF'S DEED. A sheriff's deed only relates back to the day of sale as to the defendant in the execution under which the sale is made, his privies and strangers purchasing with notice. *Ford v. French*, 250.

4. FRAUD. A deed fraudulently obtained by the intended grantee will be void for want of delivery, and will convey no title even to an innocent purchaser. *Taylor v. Davis*, 291.

5. FRAUDULENT CONVEYANCE. The doctrine of the cases of *Claflin v. Rosenberg*, 42 Mo. 439; *Wright v. McCormick*, 67 Mo. 426, and *Stern v. Henley*, 68 Mo. 262, in relation to fraudulent conveyances, is re-affirmed. *Mills v. Thompson*, 367.

6. A MINING LEASE. An instrument which purports, in consideration of a fixed annual rental, to lease *and convey* for a term of years all the coal on or under certain described land, is a mining lease, and authorizes the lessee to take out all the coal he can mine on the premises during the term. It is not an absolute grant of all the coal in the land. *Austin v. The Huntsville Coal & Mining Company*, 535.

7. EVIDENCE: DEED DEFECTIVELY ACKNOWLEDGED, BUT RECORDED THIRTY YEARS. Before a certified copy of a record of a deed, which was not acknowledged or proved according to law before being recorded, can be read in evidence, the original deed must be shown to be lost or destroyed. Section 36 of the chapter on evidence, (Wag. Stat., p. 595,) dispenses with proof of the execution of such a deed where the record is thirty years old at the time of offering the copy in evidence, but in no case does it dispense with proof of its loss or destruction. *Crispen v. Hannavan*, 548.

8. ——: ——. Under the above section an original deed is receivable in evidence without proof of execution, though not acknowledged or proven according to law, if the deed has been recorded thirty years or more when offered in evidence. *Ib.*

9. ——: COPY OF RE-RECORDED DEED. By the act of March 5th, 1874, (Sess. Acts, p. 33,) where a deed conveying lands situate in two or more counties is recorded in one of such counties, a certified copy of such record may be recorded in any other of such counties, and a certified copy of such last record may be read in evidence upon proof that the original deed is not in the possession or under the control of the party offering the copy. *Ib.*

10. EVIDENCE: PRACTICE. Failure to object to the admission of a deed in evidence concedes its execution but not its legal effect. *Bartlett v. O'Donoghue*, 553.

11. DEED TO WIFE'S REAL ESTATE. An unacknowledged deed of husband and wife to real estate of the wife, is of no effect as a conveyance as against her; nor will it pass his marital right of possession. *Ib.*

12. MARRIED WOMAN'S DEED: ACKNOWLEDGMENT: FRAUD. A deed of husband and wife to the wife's real estate, not acknowledged by her as required by law, is ineffectual to convey his interest. So, if her signature be obtained by fraud, the deed will be ineffectual against him, at least as between him and a party affected with notice of the fraud. *Goff v. Roberts*, 570.

13. ESTATE: DEED. Where tenant for life in his own right executes a conveyance purporting and intended to convey the fee, the conveyance, though ineffectual for that purpose, will pass his life estate. *Foote v. Sanders*, 616.

CONVEYANCE BY CHILD TO PARENT: UNDUE INFLUENCE: BURDEN OF PROOF. See Miller v. Simonds, 669.

HEIRS OF PARTY TO DEED, AS WITNESSES, OTHER PARTY BEING DEAD. See Martin v. Jones, 23.

DEEDS OF TRUST AND MORTGAGES.

1. LIEN ON PROPERTY YET TO BE ACQUIRED. One who has in contemplation the purchase of property may by contract impose a lien which will be valid and take effect when the property is acquired. *Wright v. Bircher*, 179.

2. ———: LANDLORD'S LIEN FOR RENT: PRIORITY OF LIENS: EQUITY: NOTICE. The proprietors of a hotel took a lease for a term of years upon an unfinished building to be used, when completed, as part of their hotel. The rent was payable monthly. The lease was to commence, or take effect on the first of the month after the completion of the building. It contained a stipulation that all fixtures, furniture and other improvements should be bound for the rent. When the lease was signed, the house was unfurnished, but before it took effect certain furniture and fixtures had been placed in the house. *Held*, that the stipulation created a lien, valid at least in equity, that this lien was for the full amount of the rent reserved and not simply for any portion that might from time to time become delinquent, and that it had priority of a mortgage given after the lease took effect but before any rent became delinquent, to a person having knowledge of the existence of the stipulation. *Ib.*

3. SECRET ARRANGEMENT TO DEFEAT THE LIEN OF A JUNIOR INCUMBRANCE: GARNISHMENT. A tract of land being about to be sold under several mortgages, it was arranged between the mortgageor, the last mortgagee and one A. that the latter should bid off the land at $3,000, a sum insufficient to pay all the mortgages, but that he should actually pay $1,939.85, which was more than sufficient to pay them all, and that the surplus should be paid to the last mortgagee to indemnify him against a liability which he had assumed for the mortgageor. This arrangement was carried out, and the money was paid accordingly. A junior judgment creditor of the mortgageor claiming the surplus; *Held*, that it was subject to the lien of his judgment the same as the

land had been, notwithstanding the above mentioned agreement; *Held*, also, that it could be reached by garnishment against the last mortgagee. *McGuire v. Wilkinson*, 199.

4. DEED OF TRUST: ACKNOWLEDGMENT BEFORE TRUSTEE VOID, BUT DOES NOT AVOID DEED. While an acknowledgment of a deed of trust taken by the person named as trustee is void, so that the instrument is not entitled to record, the deed is not thereby rendered void, but is good as between the parties to it and all persons having actual notice of it. *Williams v. The Monitrau National Bank*, 292.

5. ———: PAROL EVIDENCE TO SUPPLY DEFECTS IN. It is not essential to the validity of a deed of trust that the paper intended to be secured shall be accurately described. If the description, though indefinite, is capable of being rendered certain by the use of parol evidence it is sufficient. *Ib.*

6. ———: PAROL EVIDENCE. Where a deed of trust described the note intended to be secured as bearing date January 28th; *Held*, that parol evidence was admissible to prove that a note dated January 25th was intended. (*Scott v. Bailey*, 23 Mo. 140.) *Ib.*

7. MORTGAGE: RIGHT AND DUTY OF MORTGAGEE AS TO CONTROL OF MORTGAGED PREMISES. Prior to default in the payment of a debt secured by mortgage, the mortgagee has no right to forbid the mortgageor or his licensee from doing any work on the mortgaged premises which will not impair their value as security. But after default he may, and under some circumstances equity requires that he shall, interfere. Thus, if he knows that a railroad company is building its road across the premises, under a parol license or an unrecorded deed given by the mortgageor prior to the default, it is his duty to notify the company of his rights, and to forbid the further prosecution of the work. If he fails to do this, and the company afterward makes expenditures upon the work, the license of the mortgageor will be held to be his license also. *Masterson v. The West End Narrow Gauge Railroad Company*, 342.

8. EQUITY: MORTGAGE: RIGHT TO REDEEM. One McH. bought a tract of land subject to a mortgage held by plaintiff, agreeing with the vendor to pay the mortgage debt. The land was afterward sold under an older mortgage, defendant becoming the purchaser. This was in pursuance of an arrangement between defendant and McH., by which McH. was to have time to redeem. McH. did not redeem, but instead, accepted $600 from the defendant in settlement of his claims and rights, and surrendered possession of the premises to defendant. After this plaintiff brought this suit to enforce his mortgage note against defendant and to be allowed to redeem. *Held*, that he could not maintain the action; that McH.'s agreement to pay plaintiff's mortgage could only entitle plaintiff to a personal judgment against McH. for the amount of the mortgage, and could not confer on him the right in equity to be subrogated to McH.'s right of redemption under his agreement with defendant, or if it could, since McH. had parted with that right, plaintiff could not claim the right to enforce it. *Duncan v. Baker*, 469.

9. DEED OF TRUST: SALE IN ABSENCE OF TRUSTEE. It is well settled in this State that a sale under a deed of trust given to secure the payment of a debt is not valid if the trustee be not present at the sale, unless the deed authorizes the trustee to delegate his power to an-

other, in which case a substitute may act. (*Lanarum v. Union Bank*, 63 Mo. 51; *Graham v. King*, 50 Mo. 22.) *Spurlock v. Sproule*, 503.

10. MEASURE OF DAMAGES: MECHANICS LIEN: DEED OF TRUST. In the absence of fraud, malice and oppression, the measure of damages for refusal of a purchaser under a deed of trust to permit a purchaser at mechanics lien sale to remove a building erected after the execution of the deed of trust, (as permitted by section 3 of the mechanics lien law, Wag. Stat., p. 908,) is not the value of the building as it stands, but what it would be worth removed from the land. *Seibel v. Siemon*, 526.

11. EJECTMENT: DEED OF TRUST: ESCROW. Where plaintiff in ejectment claims through a sale under a deed of trust, to which he was himself a party, the defendant may show that the instrument was never delivered, but was placed in escrow to be delivered upon the fulfillment of a condition, and that plaintiff obtained possession of it without fulfilling the condition. *Goff v. Roberts*, 570.

12. PAROL EVIDENCE TO EXPLAIN LATENT AMBIGUITY. Where a deed of trust provides for a sale "at the court house door at the city of J.," if it appears that at the time of the execution of the deed there were two houses in the city of J. called court houses, parol evidence is admissible to show which was intended. *Ib.*

13. FRAUDULENT CONVEYANCE: POSSESSION AND POWER OF SALE IN MORTGAGEOR. One V. having bought a stock of goods on credit, to secure the payment of the purchase money, gave a mortgage on the goods, together with other goods of his own. The mortgage described the goods as being "now kept and offered for sale at the store room at," etc., and by its terms was to extend to and include any goods which V. might thereafter add to the stock. The mortgagee was authorized to take and remove the goods in case of failure to pay the mortgage debt. *Held*, that it did not appear from the face of this instrument that the mortgageor was to retain possession of the goods with a power of sale, and the mortgage could not, therefore, be declared void on its face. *Hewson v. Tootle*, 632.

14. ——— : WHEN VOID AS MATTER OF LAW. The court cannot declare a conveyance to be fraudulent and void, unless it is fraudulent on its face. If the question of its validity depends upon extrinsic evidence, that evidence must be submitted to a jury. *Ib.*

INJUNCTION AGAINST SALE UNDER DEED OF TRUST. See Martin v. Jones, 23.

DIVORCE.

AS AFFECTING WIFE'S HOMESTEAD RIGHTS. See Blandy v. Asher, 27.

DOMICILE.

OF ORPHAN INFANT UNDER GUARDIANSHIP: APPOINTMENT OF GUARDIAN. The domicile of an orphan infant under fourteen years of age, is not changed by the act of his guardian in removing him from the county where his parents lived and died to the home of the guardian in another county, and his residence there. Upon the death of such a guardian while the child is still under fourteen, his suc-

cessor should be appointed by the probate court of the former and not of the latter county. *Marheineke v. Grothaus*, 204.

DOWER.

WIDOW'S ALLOWANCE, HUSBAND DYING CHILDLESS: MAY CLAIM A SEWING MACHINE. If a man die without children, his widow will be entitled to take as her absolute property the articles allowed her by section 33, article 2 of the administration act, (Wag. Stat., p. 88,) whether she elects to take her dower, or the half of his estate as allowed by section 5 of the dower act, (Wag. Stat., p. 539). A sewing machine is one of the implements of industry which she may claim under section 33. *The State ex rel. Steers v. Taylor*, 656.

DRAMSHOPS.

SEE DRUGGISTS.

DRUGGISTS.

DRUGGISTS AND PHYSICIANS MUST GIVE BOND TO SELL LIQUOR. Section 6 of the act in relation to the inspection of liquors, while it permits druggists and physicians to mix and adulterate spirituous and other liquors for medicinal and mechanical purposes, does not exempt them from making the affidavit and giving the bond required by sections 4 and 10 of the same act of all persons who deal in such liquors. Wag. Stat., pp. 719, 720. *The State v. Ferguson*, 297.

DURESS.

RECOGNIZANCE. A recognizance given by one in custody under an illegal warrant, is involuntary, and cannot be enforced against him or his sureties. *The State v. Swope*, 399.

EJECTMENT.

1. HOMESTEAD. A defendant in ejectment cannot claim under the homestead act land exceeding in value the statutory limit. *Blandy v. Asher*, 27.

2. EJECTMENT can be maintained only upon a legal title existing at the time the action is commenced. *Ford v. French*, 250.

3. ADMINISTRATOR'S INFORMAL DEED: EJECTMENT. If an administrator's deed to land sold for the payment of debts of his intestate, be wanting in formality, (as, if it lack a seal, or be not properly acknowledged and certified,) it will still vest in the purchaser at least an equitable title; and if the facts are properly pleaded, will constitute an equitable defense to an action of ejectment brought by the heirs of the deceased against one claiming under it. *Snider v. Coleman*, 568.

4. PLEADING: GENERAL ISSUE IN EJECTMENT: ESCROW: DEED OF TRUST.

Under the general issue in ejectment, the defendant may show that a deed of trust under which plaintiff claims was delivered as an escrow and not absolutely, and that the sale thereunder was made at the wrong place. Neither of these is an equitable defense, requiring to be specially pleaded. *Goff v. Roberts*, 570.

5. THE evidence in this case, an action of ejectment, fails to sustain the defenses set up in the answer that the defendant's grantor entered the land in controversy, and that plaintiff, who had a patent from the government, obtained it with knowledge that defendant had an equitable right to the land. *Held*, therefore, that the judgment below, which was for the defendant, must be reversed. *Widdicombe v. Mercer*, 588.

ELECTION.

1. BRIBERY OF THE PUBLIC BY CANDIDATE FOR OFFICE. It is unlawful for a candidate for public office to make offers to the voters to perform the duties of the office, if elected, for less than the legal fees. An election secured by means of such offers is void. *The State ex rel. Attorney General v. Collier*, 13.

2. COUNTY CLERK'S DUTY IN CERTIFYING RETURNS. The clerk of the county court must certify to the Secretary of State, the vote in the several precincts, as it is certified to him by the judges and clerks of election. He has no right to refer to the poll books and tally sheets sent in by them, for the purpose of verifying or correcting their certificates. If they have made a mistake in casting up the votes, the error can only be corrected by the tribunal authorized to determine contested elections. (*Mayo v. Freeland*, 10 Mo. 620.) *The State ex rel. Ford v. Trigg*, 365.

EFFECT OF FALSE ANNOUNCEMENT OF RETURNS. See Adams v. Lindell, 198.

RE-ELECTION OF BANK CASHIER DETERMINES LIABILITY OF HIS SURETIES. See The Savings Bank of Hannibal v. Hunt, 597.

EMBEZZLEMENT.

1. INDICTMENT FOR EMBEZZLEMENT: AVERMENT OF AGENCY. An indictment for embezzlement framed under section 55, page 458, Wagner's Statutes, need not directly aver the defendant's agency: it is sufficient if the agency distinctly appears. *The State v. Dodson*, 283.

2. EMBEZZLEMENT. Under an indictment charging embezzlement of horses, it is error to admit evidence or to instruct the jury in regard to embezzlement of the proceeds of the horses. *Ib.*

EMBLEMENTS.

SEE CROPS.

EMINENT DOMAIN.

1. THE right of eminent domain resides in the State, and may be enforced, not only in behalf of the State, but of any artificial person clothed with a franchise, the enjoyment of which promotes a public use. The basis of the enforcement is the necessity for the public use of the property the taking of which is sought. *Leisse v. The St. Louis & Iron Mountain Railroad Company*, 561.

2. ABANDONMENT OF PROCEEDINGS: DAMAGES. If proceedings are instituted to condemn for public use the property of an individual, and after the value of the property is ascertained by inquest, the proceedings are abandoned because the price assessed is unsatisfactory, the corporation instituting such proceedings will be answerable to the owner for all damages occasioned by them. *Ib.*

3. ——: REMEDY OF JOINT OWNERS. Where property, against which proceedings to condemn for public use have been instituted and afterward abandoned, belonged to A & B, co-tenants, who in resisting the proceedings employed different counsel, who severally attended to the management of the case; *Held*, that it was error to permit them to sue jointly to recover damages for counsel fees. *Ib.*

4. ——: DAMAGES. In an action to recover damages for the institution of proceedings to condemn private property for public use, money need not have been actually paid out to entitle plaintiff to recover; but if a debt has been created by reason of such proceedings, a damage has been incurred for which an action will lie. *Ib.*

EQUITY.

1. EQUITY JURISDICTION: INJUNCTION: DEED OF TRUST. Equity will interfere by injunction in favor of one claiming title to land through an unrecorded deed, to prevent a sale under a deed of trust held by one who took it with notice of the plaintiff's claim. *Martin v. Jones*, 23.

2. RELIEF IN EQUITY AGAINST MISTAKE OF LAW, WHEN GRANTED. Mere ignorance of the law on the part of a party to a contract will not authorize a court of equity to set aside the contract. There must be something more. The attending circumstances must be such as to excite suspicion of fraud, imposition, misrepresentation or undue influence on one side, and imbecility, credulity or blind confidence on the other. Upon this principle, where it appeared that defendant had believed himself not legally bound to pay plaintiff's claim, but plaintiff's attorney had pressed him for payment, insisting that he was bound, and had prevailed upon him to execute a note for the amount, but it did not appear that he had relied upon the attorney's opinion, nor what were the considerations which induced him to accede to the attorney's demand, and there was no testimony tending to create even a suspicion of fraud, imposition, misrepresentation or undue influence; *Held*, that even if plaintiff's claim was originally unfounded, equity would not relieve defendant from payment of the note. *Dailey v. Jessup*, 144.

3. ENJOINING JUDGMENT FOR FRAUD OF COMPLAINANT'S ATTORNEY. A

judgment will not be set aside or enjoined at the instance of the losing party, on the ground that he had intended to appeal from it, but was prevented from perfecting his appeal through the fraudulent conduct of his own attorney, unless it distinctly appears that the complainant was damnified by the failure to perfect the appeal. *Dobbs v. The St. Joseph Fire & Marine Insurance Company*, 189.

4. RELIEF AGAINST MISTAKE IN SHERIFF'S SALE: ACTION AGAINST THE DEFENDANT IN THE EXECUTION. The doctrine of *caveat emptor* does not apply to sheriff's sales where there is a mistake made both by the sheriff and the purchaser, in selling a tract of land to which the defendant in the execution has no title. In such case since the consideration for the money paid on the execution has failed, and the money has gone to extinguish the defendant's debt, the purchaser may recover it back from him; and it is not essential that the purchaser shall have made improvements upon the land, (as was the case in *McLean v. Martin*, 45 Mo. 393;) it is enough if the money has passed out of the sheriff's hands before the mistake is discovered. *Wilchinsky v. Carender*, 192.

5. SETTLEMENT OF PARTNERSHIP ACCOUNTS: PRACTICE. When a partnership is created for a joint undertaking, each partner to collect certain proceeds, and the entire receipts to be shared upon a basis fixed in the agreement, any claim preferred by one against the other for a share of proceeds unfairly withheld, is the proper subject for the taking of an account, to ascertain the various items of receipt and disbursement by either partner, to compare them together, and strike the proper balance. But if the parties themselves have cast up the items, and agreed upon the state of the account and the resulting balance either way, there is no further account to be taken, unless upon a suggestion of fraud, mistake or omission, operating to falsify their conclusion; and the court cannot interfere with the result thus settled by the parties. *Silver v. The St. Louis, Iron Mountain & Southern Railway Company*, 194.

6. PERSONS IN POSITIONS OF CONFIDENCE AND INFLUENCE, HOW THEY MUST DEAL. Whenever there exist between parties confidence on the one hand and influence on the other, from whatever cause they may spring, equity requires in all dealings between them the highest degree of good faith on the part of him in whom the confidence is reposed. If a conveyance is executed by the other in his favor, the burden rests upon him to prove that it was not procured by means of such confidence and influence. It is his duty, before accepting the conveyance, to see that the grantor has disinterested advice and full information. *McClure v. Lewis*, 314.

7. CASE ADJUDGED: ESTOPPEL: ALLOWANCE FOR IMPROVEMENTS. The plaintiff was a single woman, about fifty-two years of age, a confirmed invalid, broken down with disease, both in body and mind, gloomy and hysterical from her bodily ailments and the recent loss of near and dear relatives. She was much attached to defendant's wife, who was her niece, and she lived in defendant's house. Defendant and his wife were very kind to her, and by this means had acquired influence over her. Under these circumstances she executed conveyances of all her property to defendant for a consideration not exceeding one-eighth of its value. This was done hurriedly, without the knowledge of any friend or relative of plaintiff, (being concealed even from her sister who occupied an adjoining

room in defendant's house) without any suggestion from defendant that she should take counsel from others, without giving her time or opportunity to do so if she desired, and without informing her of the value of the property. The deed was drawn under defendant's directions by an attorney who was an entire stranger to the family, though there was a firm, equally convenient, who had always been employed by plaintiff's deceased brothers, from whom she derived her estate and in whom she had great confidence, and once by plaintiff herself. After receiving the conveyances, defendant, with the consent and encouragement of plaintiff, erected a house on part of the property. This was while she still lived with defendant. An estrangement having subsequently arisen, they separated, and plaintiff then brought this suit to set aside the conveyances. *Held*, that they were obtained by undue influence. *Held*, also, that the receipt of the consideration and the acquiescence by plaintiff in the erection of the house did not estop her, because they both took place while she was still under defendant's influence. The conveyances were, therefore, set aside, but defendant was allowed the cost of the house. *Ib.*

7. MORTGAGE: RIGHT AND DUTY OF MORTGAGEE AS TO CONTROL OF MORTGAGED PREMISES. Prior to default in the payment of a debt secured by mortgage, the mortgagee has no right to forbid the mortgageor or his licensee from doing any work on the mortgaged premises which will not impair their value as security. But after default he may, and under some circumstances equity requires that he shall, interfere. Thus, if he knows that a railroad company is building its road across the premises, under a parol license or an unrecorded deed given by the mortgageor prior to the default, it is his duty to notify the company of his rights, and to forbid the further prosecution of the work. If he fails to do this, and the company afterward makes expenditures upon the work, the license of the mortgageor will be held to be his license also. *Masterson v. The West End Narrow Gauge Railroad Company*, 342.

8. IRREGULAR TRANSFER OF STOCK: STOCK NOTE. Equity will protect the claims of the holder of stock irregularly transferred, and if the corporation goes into liquidation, will authorize it to enforce a stock note given by the transferrer in payment of the stock in order to provide means for its redemption. *The Home Stock Insurance Company v. Sherwood*, 461.

9. EQUITY: MORTGAGE: RIGHT TO REDEEM. One McH. bought a tract of land subject to a mortgage held by plaintiff, agreeing with the vendor to pay the mortgage debt. The land was afterward sold under an older mortgage, defendant becoming the purchaser. This was in pursuance of an arrangement between defendant and McH., by which McH. was to have time to redeem. McH. did not redeem, but instead, accepted $600 from the defendant in settlement of his claims and rights, and surrendered possession of the premises to defendant. After this plaintiff brought this suit to enforce his mortgage note against defendant and to be allowed to redeem. *Held*, that he could not maintain the action; that McH.'s agreement to pay plaintiff's mortgage could only entitle plaintiff to a personal judgment against McH. for the amount of the mortgage, and could not confer on him the right in equity to be subrogated to McH.'s right to redemption, under his agreement with defendant, or if it

could, since McH. had parted with that right, plaintiff could not claim the right to enforce it. *Duncan v. Baker*, 469.

10. WIFE'S EQUITY, RULE AS TO SETTLEMENT OF: EFFECT OF SETTLEMENT UPON HER AND HER HEIRS. It seems to be an established rule in England, and perhaps also in the United States, that a court of equity, in making settlement of the property of a married woman, will direct the title to be held in trust for her and her children, not for her alone. Without deciding whether this rule prevails in Missouri; *Held*, that where a married woman applied to a court of equity to have certain funds belonging to her invested in land for a home for herself *and her family*, and the court, with all the facts before it, ordered that the investment should be made as prayed, and appointed a trustee to hold the land for her *and her heirs*, and directed that a conveyance be made to him accordingly, a conveyance taken in conformity to such decree conferred upon her an absolute estate in equity, not an estate for life with remainder to her children. HOUGH, J., dissented. *Mercier v. The West Kansas City Land Company*, 473.

11. CONVEYANCE BY CHILD TO PARENT: UNDUE INFLUENCE: BURDEN OF PROOF. A voluntary conveyance by a child to its parent while still under the parental control, is presumptively void. The burden is upon the parent to show, in the clearest and most satisfactory manner, that it is in every particular worthy of receiving the sanction of a court of equity. A voluntary conveyance made by a daughter to her father before marriage was in this case assailed by her and her husband as having been obtained through undue influence. She testified that her father used no improper or undue influence of any nature to induce her to sign the deed; that he never even spoke to her on the subject until after the deed was prepared and she was about to execute it; that her brother, who joined in the deed, conveying his equal interest in the same property, first suggested the propriety of the step, and that she readily assented. She was at the time three years and three months past her majority. She was, however, living in her father's house. The deed conveyed an estate for her father's life in all the property she had. It was executed when she was on the eve of marriage, improvidently, without time or opportunity for proper reflection, and without any independent advice. *Held*, that it must be set aside. *Miller v. Simonds*, 669.

EQUITABLE LIEN ON AFTER-ACQUIRED PROPERTY. See Wright v. Bircher, 179.

ENJOINING EXECUTION SALE AS A CLOUD ON PLAINTIFF'S TITLE. See South Presbyterian Church v. Hintze, 363.

ESCROW.

EJECTMENT: DEED OF TRUST: ESCROW. Where plaintiff in ejectment claims through a sale under a deed of trust, to which he was himself a party, the defendant may show that the instrument was never delivered, but was placed in escrow to be delivered upon the fulfillment of a condition, and that plaintiff obtained possession of it without fulfilling the condition. *Goff v. Roberts*, 570.

ESTATES.

1. ESTATE IN LAND: CONDITION SUBSEQUENT. Land was conveyed to a municipal corporation, to be used as a market place, to be held in fee so long as so used, to revert to the donor when it ceased to be so used, and the donee, upon failure to so use it, to reconvey to the donor. *Held*, that this was not a determinable fee, but an estate held upon condition subsequent; and that the condition, though broken, did not defeat the estate before entry by the donor. *Adams v. Lindell*, 198.

2. WILL: PERSONAL CHARGE ON DEVISEE FOR LIFE: DEVISE OF "WHAT REMAINS" AFTER LIFE ESTATE. A testator by his will appointed his wife executrix of his estate, willed that all his just debts be paid, and that his wife raise his children as she might think proper, and bequeathed to her "all my (his) estate, both real and personal, during her natural life or widowhood, and what then remains to be equally divided among my (his) children." *Held*, that the clauses relating to the payment of debts and the rearing of the children imposed no personal charge upon the wife, so as to afford an opportunity for the application of the rule that, when a will imposes a charge on the person of a devisee, it creates a fee; neither do the words "what then remains" imply a power of disposition of the real estate, annexed to the life estate devised to the wife; they are to be limited to the personalty. The wife's interest in the realty, therefore, was a simple life estate. *Foote v. Sanders*, 616.

3. ESTATE: DEED: Where tenant for life in his own right executes a conveyance purporting and intended to convey the fee, the conveyance, though ineffectual for that purpose, will pass his life estate. *Ib.*

ESTOPPEL.

1. CORPORATION: HOW LIABILITY AS STOCKHOLDER MAY BE ASSUMED. One may render himself liable as stockholder in a corporation as well by his conduct in respect to the stock of the corporation, as by formal subscription and acceptance of stock. *Griswold v. Seligman*, 110.

2. CASE ADJUDGED. Accordingly, where defendants advanced money to a corporation, and to secure the advances, received from the corporation a certificate for a majority of its capital stock, which was absolute and unconditional on its face, but was to be held by them "in trust" as declared by a resolution of the board of directors, or "in escrow," as it was expressed in an entry on the stock book of the corporation; and while so holding the stock, defendants voted it at one election and thus elected the directors and other officers, and thereby obtained complete control of the corporation; *Held*, that they were estopped to deny that they were stockholders, and were liable as such, both to the corporation and its creditors; and this so far as the creditors were concerned, whether they became such before defendants had so treated the stock or not.

NORTON, J., dissenting, denied that there was any liability.

HENRY, J., agreed that defendants were liable to creditors, but denied any liability to the corporation. *Ib.*

3. CONTRACT: AGENT: EVIDENCE. Where one party to an alleged contract made by its agent denies the contract, and then introduces the agent to prove what the contract really was, such party will not be heard to deny the agent's authority to make any contract whatever. *Silver v. The St. Louis, Iron Mountain & Southern Railway Company*, 194.

4. THE facts proven in this case do not make out a case of estoppel against the plaintiff. *Williams v. The Moniteau National Bank*, 292.

5. NO ESTOPPEL IN FAVOR OF STRANGERS. Where there are conflicting surveys of an ancient lot now divided into several parcels, and the parties claiming one of the parcels enter into a partition of it among themselves according to the metes and bounds fixed by one of the surveys, this will not be such an acceptance of that survey as will conclude these parties from asserting the correctness of the other in an action between them and a stranger to the deed, involving title to one of the other parcels. *Glasgow v. Baker*, 441.

6. TRANSFER NOT IMPEACHABLE BY TRANSFERRER. One who has transferred a stock certificate for value, cannot afterward, in his own defense, object to the transfer on the ground that it was not made in the mode prescribed by the by-laws or charter. *The Home Stock Insurance Company v. Sherwood*, 461.

7. THE doctrine of estoppel cannot be invoked unless what was said or done by the party to be estopped, can be shown to have influenced the conduct of the other. *Spurlock v. Sproule*, 503.

8. EQUITY. The facts of this case are not such as to estop the plaintiffs from asserting their title to the land devised to them by their father on the ground that they have enjoyed the proceeds of a sale of the land made by his executrix. *Foote v. Sanders*, 616.

ESTOPPEL AGAINST PLEADING ULTRA VIRES. See First National Bank of Trenton v. Gillilan, 77.

ACQUIESCENCE, WITHOUT ESTOPPEL. See McClure v. Lewis, 314.

EVIDENCE.

1. OF THREATS. In the absence of evidence of conspiracy between father and son, antecedent threats made by the son against the life of the defendant are not admissible in evidence on behalf of the defendant upon the trial of an indictment for an assault upon the father. *The State v. Stark*, 37.

2. PAROL EVIDENCE TO MODIFY WRITTEN CONTRACT. Where stock is held under a written contract, as security for advances, it is not competent to show that there was a verbal understanding that the bailees were to have the privilege of voting the stock. *Griswold v. Seligman*, 110.

3. IN an action to establish a claim consisting of many items, against the estate of a deceased person, evidence was offered in chief, to

show that he was a man of careless business habits, slow to pay and loth to settle. *Held*, that it was properly excluded. *Goddard v. Williamson's Admr.*, 131.

4. NEGOTIABLE PAPER: INDORSER'S LIABILITY: PAROL EVIDENCE: AGENCY. An indorser of a negotiable promissory note cannot escape liability to a subsequent indorsee for value and without notice, by showing that his indorsement was not made until after he had received the money for which the note was given, and that it was then made for the sole purpose of passing title to the indorsee and under a verbal agreement with the agent of the latter that the words "without recourse" should be written over the indorsement. *Lewis v. Dunlap*, 174.

5. EVIDENCE, POSITIVE AND NEGATIVE. Positive evidence should have more weight than the negative evidence of persons having no special facilities for knowing the fact. *Sullivan v. The Hannibal & St. Joseph Railroad Company*, 195.

6. NEGOTIABLE PAPER: FRAUD AS A DEFENSE: ORDER OF EVIDENCE. When the maker of a negotiable note proves that the instrument had its origin in fraud, or was fraudulently put in circulation, it is incumbent upon the holder, before he can recover, to prove that he received it *bona fide*, before maturity and for value.

The proper order of proof in such cases is for the plaintiff, after defendant has offered his evidence of fraud, to meet it by evidence of *bona fides* on his part. He is not required, however, to prove that he had no knowledge of the specific facts which impeach its original validity; but may make general proof that he received it before due, *bona fide* and for value. It will then be for defendant to prove that plaintiff had actual notice of the specific facts; and if he fails in this plaintiff must recover. *Johnson v. McMurry*, 278.

7. PAROL EVIDENCE TO SUPPLY DEFECTS IN DEED OF TRUST. It is not essential to the validity of a deed of trust that the paper intended to be secured shall be accurately described. If the description, though indefinite, is capable of being rendered certain by the use of parol evidence it is sufficient. *Williams v. The Moniteau National Bank*, 292.

8. WHERE a deed of trust described the note intended to be secured as bearing date January 28th; *Held*, that parol evidence was admissible to prove that a note dated January 25th was intended. (*Scott v. Bailey*, 23 Mo. 140.) *Ib.*

9. EVIDENCE OF ONE OFFENSE ON TRIAL FOR ANOTHER. Upon the trial of one offense, evidence of an entirely distinct offense is inadmissible; but if the evidence tends to prove the commission of the offense for which the prisoner stands indicted, it is no valid objection to it that it also tends to prove another and distinct offense. Thus, where the two offenses are committed at the same place and within a few minutes of each other, under such circumstances as together to constitute a single and continuous accomplishment of a fixed and common design, evidence of both is admissible upon a trial for one. *The State v. Greenwade*, 298.

10. ——: CORROBORATION OF ACCOMPLICE'S TESTIMONY. Where the

principal witness for the State is an accomplice, evidence corroborating his testimony is properly admitted, notwithstanding it tends to prove another and distinct offense, as well as that charged in the indictment. *Ib.*

11. PRACTICE: EXCEPTIONS TO EVIDENCE. Unless exceptions to the rulings of the trial court on questions of evidence are preserved in the bill of exceptions, this court will not consider them. *Ib.*

12. EXEMPLIFIED COPY OF PATENT. An exemplification of the record of a patent from the United States showing that the patent was signed by the President, by his initials, and countersigned by the Commissioner of the General Land Office, by his initials, is admissible in evidence as a copy of the patent. *Briggs v. Holmstrong*, 337.

13. PROOF OF MUNICIPAL ORDINANCE. Books which purport to contain the charter and ordinances of a town and are shown to be in the custody of the town clerk, will be received in evidence without further attestation. *The Town of Tipton v. Norman*, 380.

14. CONVERSION: EVIDENCE. In an action against a corporation for the conversion of certain staves, defendant offered evidence that they were cut from land owned by the president of the corporation, in connection with evidence that the president had directed the taking of them. There was no evidence that he had not granted permission to plaintiffs to cut the staves, and no other evidence that they belonged to him. *Held*, that the offer was properly rejected. *Allen v. The St. Louis, Iron Mountain & Southern Railway Company*, 386.

15. CORROBORATIVE EVIDENCE. Where statements previously made by a prosecuting witness are introduced in evidence against her, other statements made by her may be introduced by the State in support of her testimony. *The State v. Hatfield*, 518.

16. RAPE: EVIDENCE: PRACTICE. Upon trial of an indictment for rape, the prosecutrix stated the substance of the vulgar language used by defendant in making his assault upon her, and another witness stated the exact words. The court refused to compel the prosecutrix to state the exact words. *Held*, no error. *Ib.*

17. PRACTICE: EVIDENCE. Where it does not appear from anything in the record that testimony offered after the close of the evidence was material, this court cannot say that the trial court has abused its discretion in refusing to open the case in order to let in the testimony. *Ib.*

18. DEED DEFECTIVELY ACKNOWLEDGED, BUT RECORDED THIRTY YEARS. Before a certified copy of a record of a deed, which was not acknowledged or proved according to law before being recorded, can be read in evidence, the original deed must be shown to be lost or destroyed. Section 36 of the chapter on evidence, (Wag. Stat., p. 595,) dispenses with proof of the execution of such a deed where the record is thirty years old, at the time of offering the copy in evidence, but in no case does it dispense with proof of its loss or destruction. *Crispen v. Hannavan*, 548.

19. ———. Under the above section an original deed is receivable in evidence without proof of execution, though not acknowledged or proven according to law, if the deed has been recorded thirty years or more when offered in evidence. *Ib.*

20. COPY OF RE-RECORDED DEED. By the act of March 5th, 1874, (Sess. Acts, p. 33,) where a deed conveying lands situate in two or more counties is recorded in one of such counties, a certified copy of such record may be recorded in any other of such counties, and a certified copy of such last record may be read in evidence upon proof that the original deed is not in the possession or under the control of the party offering the copy. *Ib.*

21. EVIDENCE: PRACTICE. Failure to object to the admission of a deed in evidence concedes its execution but not its legal effect. *Bartlett v. O'Donoghue*, 563.

22. PAROL EVIDENCE TO EXPLAIN LATENT AMBIGUITY. Where a deed of trust provides for a sale "at the court house door at the city of J.," if it appears that at the time of the execution of the deed there were two houses in the city of J. called court houses, parol evidence is admissible to show which was intended. *Goff v. Roberts* 570.

23. LOST WRITING: PRACTICE: ORDER OF PROOF. In a suit upon a writing alleged to be lost, the court admitted evidence of the contents of the writing first, and of its loss afterward; *Held*, not reversible error. *Cross v. Williams*, 577.

24. ———: NOTICE TO PRODUCE: SECONDARY EVIDENCE. In a suit upon a written instrument, the petition alleged that the writing was either lost or destroyed or in the possession of the defendant. *Held*, that this dispensed with the necessity of notice to produce the writing as a foundation for the introduction of secondary evidence. *Ib.*

25. PAROL EVIDENCE: COUNTY COURT RECORDS. In an action on a bond given by a contractor for the construction of a county bridge, parol evidence of a conversation between the contractor and the justices of the county court is admissible for the purpose of showing that an order of record for the issuing of a warrant in payment for the bridge was not intended as a waiver of the county's right to enforce the bond in case defects should afterward appear in the bridge. The rule that the county court can speak only by its record, does not apply to such a case. *Johnson County v. Lowe*, 637.

26. AFFRAY: EVIDENCE. It is no objection to the admissibility of evidence offered in support of an indictment for an affray, that it shows that the trouble commenced in a private house, where it further shows that the combatants passed out of the house and continued the fight without cessation in a public street. *The State v. Billings*, 662.

PAROL EVIDENCE TO SHOW WHAT PAPERS CONSTITUTED A CITY ORDINANCE, REJECTED. See Keating v. Skiles, 97.

EVIDENCE IN EMBEZZLEMENT CASES. See The State v. Dodson, 283.

EXECUTION.

EQUITABLE RELIEF AGAINST MISTAKE AT EXECUTION SALE. See Wilchinsky v. Cavender, 192.

SHERIFF'S DEED. See Ford v. French, 250.

DUTY OF SHERIFF IN MAKING SALES. See The State *ex rel.* The Central Type Foundry v. Moore, 285.

ENJOINING SALE AS A CLOUD ON PLAINTIFF'S TITLE. See South Presbyterian Church v. Hintze, 363.

FRAUD.

1. NEGOTIABLE PAPER: FRAUD AS A DEFENSE: ORDER OF EVIDENCE. When the maker of a negotiable note proves that the instrument had its origin in fraud, or was fraudulently put in circulation, it is incumbent upon the holder, before he can recover, to prove that he received it *bona fide*, before maturity and for value.

The proper order of proof in such cases is for the plaintiff, after defendant has offered his evidence of fraud, to meet it by evidence of *bona fides* on his part. He is not required, however, to prove that he had no knowledge of the specific facts which impeach its original validity;, but may make general proof that he received it before due, *bona fide* and for value. It will then be for defendant to prove that plaintiff had actual notice of the specific facts; and if he fails in this plaintiff must recover. *Johnson v. McMurry*, 278.

2. DEED: FRAUD. A deed fraudulently obtained by the intended grantee will be void for want of delivery, and will convey no title even to an innocent purchaser. *Taylor v. Davis*, 291.

3. MARRIED WOMAN'S DEED: ACKNOWLEDGMENT: FRAUD. A deed of husband and wife to the wife's real estate, not acknowledged by her as required by law, is ineffectual to convey his interest. So, if her signature be obtained by fraud, the deed will be ineffectual against him, at least as between him and a party affected with notice of the fraud. *Goff v. Roberts*, 570.

ENJOINING JUDGMENT FOR FRAUD OF COMPLAINANT'S ATTORNEY. See Dobbs v. The St. Joseph Fire & Marine Insurance Company, 189.

FRAUDULENT CONVEYANCES.

1. THE doctrine of the cases of *Claflin v. Rosenberg*, 42 Mo. 439; *Wright v. McCormick*, 67 Mo. 426, and *Stern v. Henley*, 68 Mo. 262, in relation to fraudulent conveyances, is re-affirmed. *Mills v. Thompson*, 367.

2. POSSESSION AND POWER OF SALE IN MORTGAGEOR. One V. having bought a stock of goods on credit, to secure the payment of the purchase money, gave a mortgage on the goods, together with other goods of his own. The mortgage described the goods as being "now kept and offered for sale at the store room at," etc., and by its terms was to extend to and include any goods which V. might thereafter add

to the stock. The mortgagee was authorized to take and remove the goods in case of failure to pay the mortgage debt. *Held*, that it did not appear from the face of this instrument that the mortgageor was to retain possession of the goods with a power of sale, and the mortgage could not, therefore, be declared void on its face. *Hewson v. Tootle*, 632.

3. WHEN VOID AS MATTER OF LAW. The court cannot declare a conveyance to be fraudulent and void, unless it is fraudulent on its face. If the question of its validity depends upon extrinsic evidence, that evidence must be submitted to a jury. *Ib.*

FUGITIVE FROM JUSTICE.

WHAT A COMPLAINT FOR HIS ARREST MUST SHOW. See The State v. Swope, 399.

GARNISHMENT.

OF SURPLUS PROCEEDS OF DEED OF TRUST SALE. A tract of land being about to be sold under several mortgages, it was arranged between the mortgageor, the last mortgagee and one A. that the latter should bid off the land at $3,000, a sum insufficient to pay all the mortgages, but that he should actually pay $3,939.85, which was more than sufficient to pay them all, and that the surplus should be paid to the last mortgagee to indemnify him against a liability which he had assumed for the mortgageor. This arrangement was carried out, and the money was paid accordingly. A junior judgment creditor of the mortgageor claiming the surplus; *Held*, that it was subject to the lien of his judgment the same as the land had been, notwithstanding the above mentioned agreement; *Held*, also, that it could be reached by garnishment against the last mortgagee. *McGuire v. Wilkinson*, 199.

GRAND JURY.

MAY COMPEL PRODUCTION ON TELEGRAMS. See Ex Parte Brown, 83.

GUARDIAN AND WARD.

1. AVERMENT OF GUARDIANSHIP MUST BE PROVED. The answer denying the plaintiff's right to sue as guardian, and no evidence having been offered of her appointment as such, so far as the record shows, the judgment in her favor is, for that reason, reversed. *Sherman v. The Hannibal & St. Joseph Railroad Company*, 62.

2 DOMICILE OF ORPHAN INFANT UNDER GUARDIANSHIP: APPOINTMENT OF GUARDIAN. The domicile of an orphan infant under fourteen years of age, is not changed by the act of his guardian in removing him from the county where his parents lived and died to the home of the guardian in another county, and his residence there. Upon the death of such a guardian while the child is still under fourteen, his

successor should be appointed by the probate court of the former and not of the latter county. *Marheineke v. Grothaus*, 204.

3. GUARDIAN'S LIABILITY DISCHARGED BY SETTLEMENT WITH HIS SUCCESSOR. Where a female guardian of her minor son, instead of investing her ward's money in real estate, takes perfectly good notes therefor, and marries one who thereupon becomes curator of the minor, and files his inventory in which he charges himself with these notes as so much cash, and takes them from the guardian in full discharge of her liability to the ward, and the curator wastes the estate by neglecting to collect the notes at maturity, he and his sureties are liable, and the guardian is discharged. *The State ex rel. Brebaugh v. Bolte*, 272.

4. GUARDIAN'S BOND: SIGNATURE OF SURETY OBTAINED BY MISREPRESENTATION: FORGERY. A surety in a guardian's bond cannot avoid liability by showing that he was induced to sign by a representation that a name already on the bond as surety was the genuine signature of the party, when in point of fact it was a forgery, unless it be further shown that the officers of the probate court or the beneficiary had notice of the representation and its falsity. *The State ex rel. Hewitt v. Hewitt*, 603.

ACTION FOR WARD'S PROPERTY. See Halley v. Troester, 73.

HOMESTEAD.

1. DIVORCE, AS AFFECTING WIFE'S HOMESTEAD RIGHTS. Divorce obtained by the wife will not deprive her of her homestead rights acquired during coverture in her husband's land, where she continues to reside upon it with her minor children. HOUGH and HENRY, JJ., dissenting. *Blandy v. Asher*, 27.

2. ABANDONMENT BY HUSBAND OF HIS FAMILY, AS AFFECTING QUESTION OF HOMESTEAD. In the absence of evidence that a man who has abandoned his wife and children and has suffered a divorce from his wife, has since acquired a homestead elsewhere, a place which was his homestead at the time of the abandonment and continues to be the residence of his children and their mother, will still, for the purpose of preserving the rights of the children, be treated as his homestead. *Ib.*

3. HOMESTEAD: EJECTMENT. A defendant in ejectment cannot claim under the homestead act land exceeding in value the statutory limit. *Ib.*

HUSBAND AND WIFE.

1. DIVORCE, AS AFFECTING WIFE'S HOMESTEAD RIGHTS. Divorce obtained by the wife will not deprive her of her homestead rights acquired during coverture in her husband's land, where she continues to reside upon it with her minor children. HOUGH and HENRY, JJ., dissenting. *Blandy v. Asher*, 27.

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3. WIFE'S EQUITY, RULE AS TO SETTLEMENT OF: EFFECT OF SETTLEMENT UPON HER AND HER HEIRS. It seems to be an established rule in England, and perhaps also in the United States, that a court of equity, in making settlement of the property of a married woman, will direct the title to be held in trust for her and her children, not for her alone. Without deciding whether this rule prevails in Missouri; *Held*, that where a married woman applied to a court of equity to have certain funds belonging to her invested in land for a home for herself *and her family*, and the court, with all the facts before it, ordered that the investment should be made as prayed, and appointed a trustee to hold the land for her *and her heirs*, and directed that a conveyance be made to him accordingly, a conveyance taken in conformity to such decree conferred upon her an absolute estate in equity, not an estate for life with remainder to her children. HOUGH, J., dissented. *Mercier v. The West Kansas City Land Company*, 473.

4. MARRIED WOMAN'S TRUST ESTATE: WAIVER OF IRREGULARITY IN APPEARANCE. If a married woman's trustee receives the proceeds of land sold under a decree of court, and there is no evidence that he has failed to comply with his trust, neither she nor her heirs can avoid the sale on the ground that in the proceeding, which resulted in the decree, she appeared by attorney and not by next friend. *Ib.*

5. DEED TO WIFE'S REAL ESTATE. An unacknowledged deed of husband and wife to real estate of the wife, is of no effect as a conveyance as against her; nor will it pass his marital right of possession. *Bartlett v. O'Donoghue*, 563.

6. MARRIED WOMAN'S DEED: ACKNOWLEDGMENT: FRAUD. A deed of husband and wife to the wife's real estate, not acknowledged by her as required by law, is ineffectual to convey his interest. So, if her signature be obtained by fraud, the deed will be ineffectual against him, at least as between him and a party affected with notice of the fraud. *Goff v. Roberts*, 570.

CONTRACT FOR WIFE'S BENEFIT. See Scruggs v. Alexander, 134.

INFANCY.

1. NEGLIGENCE: EFFECT OF PLAINTIFF'S YOUTH ON THE RULE OF LIABILITY. The youth of a person injured on a railroad train may excuse him from concurring negligence, but it cannot supply the place of negligence on the part of the company, or extend the liability of the company for tortious acts of its servants. *Sherman v. The Hannibal & St. Joseph Railroad Company*, 62.

2. DOMICILE OF ORPHAN INFANT UNDER GUARDIANSHIP. APPOINTMENT OF GUARDIAN. The domicile of an orphan infant under fourteen years of age, is not changed by the act of his guardian in removing him from the county where his parents lived and died to the home of the guardian in another county, and his residence there. Upon

the death of such a guardian while the child is still under fourteen, his successor should be appointed by the probate court of the former and not of the latter county. *Marheineke v. Grothaus*, 204.

INJUNCTION.

1. EQUITY JURISDICTION: INJUNCTION: DEED OF TRUST. Equity will interfere by injunction in favor of one claiming title to land through an unrecorded deed, to prevent a sale under a deed of trust held by one who took it with notice of the plaintiff's claim. *Martin v. Jones*, 23.

2. INJUNCTION, IMMATERIAL IRREGULARITY IN. It is no objection to the validity of a decree for a perpetual injunction made upon a final hearing in the circuit court, that a temporary injunction has at the beginning of the case been issued by the clerk of the circuit court in pursuance of an order of the probate court, it appearing that the latter court had jurisdiction to grant temporary injunctions. *Ib.*

3. ENJOINING JUDGMENT FOR FRAUD OF COMPLAINANT'S ATTORNEY. A judgment will not be set aside or enjoined at the instance of the losing party, on the ground that he had intended to appeal from it, but was prevented from perfecting his appeal through the fraudulent conduct of his own attorney, unless it distinctly appears that the complainant was damnified by the failure to perfect the appeal. *Dobbs v. The St. Joseph Fire & Marine Insurance Company*, 189.

4. INJUNCTION TO RESTRAIN SALE AS A CLOUD ON PLAINTIFF'S TITLE. Where the title to real estate is vested in one as trustee for another, but the trust is not a matter of record, but depends upon facts resting largely in parol, injunction will lie on behalf of the beneficiary to restrain a sale of the property under an execution against the trustee as his individual estate. *South Presbyterian Church v. Hintze*, 363.

5. INJUNCTION AGAINST ILLEGAL TAXATION: PRACTICE. The remedy by injunction in the name of the State does not lie against a board of education to prevent the collection of a tax levied by the board, the validity of which is disputed on the ground that the board has no corporate existence, nor to prevent the collection of one which has been extended on the tax books and placed in the hands of the collector. The remedy in the latter case is injunction in the name of the taxpayer against the collector. *Ewing v. The Board of Education of Jefferson City*, 436.

6. EQUITABLE RELIEF AGAINST JUDGMENT. A judgment will not be enjoined for facts which existed at the time of its rendition, merely because the defendant was ignorant of them. It must appear that his ignorance was not due to any lack of diligence on his part, or that it was caused by the act of the opposite party. *Carolus v. Koch*, 645.

INNOCENT PURCHASER.

UNDER FRAUDULENT DEED, GETS NO TITLE. See Taylor v. Davis, 291.

INSANITY.

CONTRACT OF PERSON OF UNSOUND MIND. An exchange of property made by a person of mind so unsound, that the want of mental capacity is apparent to any one of ordinary prudence and observation conversing with him, is of no validity. A guardian subsequently appointed may recover the property of the insane person without tendering back that received by him in the exchange. *Halley v. Troester*, 73.

INSTRUCTIONS.

1. MUST BE LIMITED TO THE QUESTION AT ISSUE. When the petition charges negligence as the plaintiff's ground of action, and there is no question of unskillfulness on the part of defendant raised either by the petition or the plaintiff's evidence, the plaintiff is not entitled to an instruction as to the effect of unskillfulness on the part of defendant. *Bell v. The Hannibal & St. Joseph Railroad Company*, 50.

2. WHERE an unobjectionable instruction submitted to the jury an issue upon which the verdict might properly have been found, the judgment will not be reversed because another instruction was given which presents a different issue, based only upon evidence which, in the opinion of this court, would not have authorized the verdict. If it cannot be said that there is absolutely no evidence upon which the instruction could be predicated, the judgment must stand. *Noffsinger v. Bailey*, 216.

3. IT is no error for the judge, with the consent of counsel on both sides to indorse on instructions already given additional directions to the jury. *Ib.*

4. A party cannot in this court claim reversal of a judgment on a theory of the law in conflict with instructions given at his instance in the court below. *The Mastin Bank v. Hammerslough*, 274.

5. PRACTICE, CRIMINAL: INSTRUCTIONS. If a jury in a criminal case assess against the defendant a punishment authorized by law for the crime with which he is charged, it will be no ground for setting aside the verdict, that the court in its instructions under-stated the maximum punishment permitted, and authorized the jury to impose other punishments not permitted by law. *The State v. Gann*, 374.

6. ——: INSTRUCTIONS. This court will not reverse a judgment for failure of the trial court to give an instruction which is substantially embraced in one that is given, or for failure to give an instruction calling the special attention of the jury to particular facts in evidence. *Ib.*

7. EVIDENCE: INSTRUCTION. The fact that evidence irrelevant to the issue as made by the pleadings is admitted without objection, does not authorize the court to instruct the jury that they may find a

verdict upon that evidence. *Price v. The St. Louis, Kansas City & Northern Railway Company*, 414.

8. HARMLESS ERROR IN INSTRUCTION. If the verdict is warranted by the evidence, this court will not reverse because the trial court incorrectly declared the rule of damages. *Blewett v. The Wyandotte, Kansas City & Northwestern Railway Company*, 583.

9. IF conflicting instructions be given, the judgment must be reversed. *Stevenson v. Hancock*, 612.

INSURANCE.

1. A BENEVOLENT SOCIETY HELD AN INSURANCE COMPANY. An association styled "The Merchant's Exchange Mutual Benevolent Society," had for its object the giving of financial aid to the widows and children of deceased members, or to such uses and purposes as members should by last will and testament direct. The funds used for this purpose consisted of assessments made upon the survivors at the death of a member, together with interest on a fund composed of the entrance or initiation fees paid by the several members upon entering the association. The members were divided into classes and the fees paid in by those belonging to each class were kept separate from the rest, and were used for the exclusive benefit of that class. The association was governed by a board of trustees assisted by the usual executive officers. *Held*, that it was a mutual insurance company. *The State ex rel. Attorney General v. The Merchants' Exchange Mutual Benevolent Society*, 146.

2. BENEVOLENT SOCIETIES, WHEN SUBJECT TO THE INSURANCE LAWS. The act of March 8th, 1879, relating to benevolent societies, (Sess. Acts, p. 65; R. S., §§ 972, 973,) was repealed by the third section of the act of May 19th, 1879, on the same subject, (Sess. Acts, p. 66; R. S., § 974,) or, at least, was so modified as to withdraw the exemption from the operation of the general statutes relating to life insurance conferred by the first named act from any benevolent society whose sole purpose was to give aid to the widows and children or legatees of deceased members. Under section 974 only those societies are entitled to that exemption which make the giving of such aid an incident to some other form of benevolence. *Ib.*

3. SUIT BY RECEIVER OF AN INSURANCE COMPANY IN HIS OWN NAME. Section 32 of the insurance law, (Wag. Stat., p. 774,) confers upon the courts, in proceedings instituted against an insurance company under that law by the Superintendent of the Insurance Department, power to appoint agents or receivers to take possession of the property of the company and to make such orders and decrees as may be needful to suspend, restrain or prohibit the further continuance of the business of the company, or for the dissolution of the company and the winding up of its affairs. *Held*, that the general power of making all needful orders for winding up the affairs of the company thus conferred included the power to make an order authorizing and directing a receiver appointed in such a proceeding to bring suit in his own name for the assets of the company; and that a suit so brought under such an order could be maintained. *Gill v. Balis*, 424.

4. FRAUDULENT ATTEMPT OF DIRECTORS TO RELEASE STOCKHOLDERS. The board of directors of an insurance company knowing that their company had just been reported by an official examiner to the Superintendent of the Insurance Department as being in an unsound condition, and that that officer would probably institute legal proceedings to have the company wound up, passed a resolution to the effect that all stockholders who would pay five per cent on their stock, (on which ninety per cent was unpaid,) and would surrender their stock certificates to the company, should have the privilege of retiring from the company, and withdrawing their stock notes. If all the stockholders had acted on this resolution, the company would have had the means of paying about one-half its ascertained liabilities, and no more, with no provision for its outstanding policies. *Held*, that the resolution was a fraud in law, if not in fact, upon the creditors of the company, and was no protection, as against them, to those stockholders who had availed themselves of its provisions. *Ib.*

5. INSURANCE OF COUNTY BUILDINGS. The county courts have power to enter into contracts for the insurance of county buildings against fire or lightning. *Walker v. Linn County*, 650.

INTEREST.

ADMINISTRATION: INTEREST. An administrator sold property of the estate on credit, receiving notes of solvent persons bearing interest at ten per cent. Some of these notes were paid. The makers of the others remained solvent for several years, and there was no reason why the estate might not have been settled during that time. It remained open, however, and at a forced settlement made fifteen years afterward, the court charged the administrator with interest at ten per cent per annum with three rests. *Held*, correct. *Held*, also, that for money paid out for the estate, he should be allowed interest at the same rate with the same rests. *Scott v. Crews*, 261.

JUDGMENT.

1. ADMINISTRATION: ORDER OF PROBATE COURT, NOT COLLATERALLY QUESTIONABLE, WHEN. If an order of the probate court revoking an administrator's letters shows upon its face all the facts necessary to confer jurisdiction on the court, its validity cannot be questioned in an action brought by the administrator *de bonis non* against the removed administrator to recover assets not accounted for. *Scott v. Crews*, 261.

2. NUNC PRO TUNC ENTRIES. In the absence of anything to show that an order or judgment as made by the court was different from that actually entered, no correction can be made in the latter by a *nunc pro tunc* entry at a subsequent term. A mere erroneous judgment cannot be thus corrected. *Fetters v. Baird*, 389.

3. JUDGMENT: LEASE. Mere recovery of a judgment for rents due upon a mining lease of coal lands does not vest in the lessee the property in the coal; and this is true whether the judgment be satisfied or not. *Austin v. The Huntsville Coal & Mining Company*, 535.

4. ADMINISTRATOR'S ANNUAL SETTLEMENT, NOT CONCLUSIVE. The annual settlements of an administrator are not conclusive on creditors, but may be reviewed and corrected at their instance on final settlement. *Ritchey v. Withers*, 556.

5. NUNC PRO TUNC ORDERS. If there is a discrepancy between the judgment of the probate court allowing a demand against the estate of a decedent and the entries made by the clerk on the back of the demand and in the book of abstracts of allowances, the latter may, by a *nunc pro tunc* order, be made to conform to the judgment. *Ib.*

6. PARTITION: JUDGMENT. The rights of a stranger purchasing at a sale under a decree in partition, cannot be affected by recitals in the decree as to the rights and liabilities of the parties thereto among themselves. Such recitals are, therefore, no evidence against him. *Stevenson v. Hancock*, 319.

7. EQUITABLE RELIEF AGAINST JUDGMENT. A judgment will not be enjoined for facts which existed at the time of its rendition, merely because the defendant was ignorant of them. It must appear that his ignorance was not due to any lack of diligence on his part, or that it was caused by the act of the opposite party. *Carolus v. Koch*, 645.

COSTS: TAXATION OF, IN CIRCUIT COURT AFTER FINAL DISMISSAL OF CAUSE BY THIS COURT: ALLOWANCE TO RECEIVER. See Morse v. The Hannibal & St. Joseph Railroad Company, 585.

JUDGMENT AGAINST A CORPORATION, BINDING ON ITS SUCCESSOR. See Hughes v. School District No 29, 643.

ACTION UNDER JUDGMENT SUBSEQUENTLY REVERSED, A TRESPASS. See The State *ex rel.* Attorney General v. France, 41.

JUDICIAL NOTICE.

1. THE court takes judicial notice that April 2nd 1877, was the first Monday in April. *The State ex rel. Simms v. Todd*, 288.

2. THE courts will take judicial notice that corn is mature in the month of December. *Garth v. Caldwell*, 622.

JUDICIAL SALE.

SHERIFF'S DEED. See Ford v. French, 250.

JURISDICTION.

1. JUSTICE'S COURT: JOINDER OF SEVERAL CAUSES OF ACTION: JURISDICTION. If one person have two causes of action against the same defendant, both cognizable before a justice of the peace, one because it is

within the limit of a justice's jurisdiction, and the other because it is of a class which justices may entertain without regard to amount, the two may be united in one complaint in a justice's court, though the aggregate exceed the limit of his jurisdiction in cases where jurisdiction depends upon the amount involved. *Fenton v. The St. Louis, Kansas City & Northern Railway Company*, 259.

2. THE circuit court has no power, upon setting aside the final settlement of a deceased administrator, to order his administrator to settle the estate. It is for the probate court to appoint an administrator *de bonis non* for this purpose. *Byerly v. Donlin*, 270.

JURY.

1. JURORS NOT DISQUALIFIED BY HAVING READ NEWSPAPER REPORTS. A person is not disqualified from serving as juror by reason of the fact that he has read newspaper accounts of the case, which created impressions that would require evidence to remove. *The State v. Greenwade*, 298.

2. BILL OF EXCEPTIONS: JUROR. Where the bill of exceptions purports to give the statements made by the jurors upon their examination on the *voir dire*, this court will not consider affidavits filed more than five days after the trial setting forth other statements. If the bill of exceptions, as allowed by the judge, is untrue, counsel should have one signed by by-standers and filed within five days, as prescribed by section 3641, Revised Statutes. *Ib.*

CONDUCT OF JURORS IN THE JURY ROOM. See The State v. Stark, 37.

JUSTICES' COURTS.

1. JOINDER OF SEVERAL CAUSES OF ACTION: JURISDICTION. If one person have two causes of action against the same defendant, both cognizable before a justice of the peace, one because it is within the limits of a justice's jurisdiction, and the other because it is of a class which justices may entertain without regard to amount, the two may be united in one complaint in a justice's court, though the aggregate exceed the limit of his jurisdiction in cases where jurisdiction depends upon the amount involved. *Fenton v. The St. Louis, Kansas City & Northern Railway Company*, 259.

2. NO WRITTEN STATEMENT NECESSARY IN SUITS ON NOTES. In a suit upon a promissory note in a justice's court, no statement of the plaintiff's cause of action need be filed. The filing of the note is all that is required, even in cases where it does not appear from anything on the instrument how plaintiff's claim arises. Defendant may, if he chooses, before proceeding to trial, require plaintiff to make a verbal explanation of this. *The Mastin Bank v. Hammerslough*, 274.

LACHES.

1. To constitute laches there must be not only delay in the institution of proceedings for relief, but such knowledge of the facts on which the claim to relief is based as renders the delay culpable. *Butler v. Lawson*, 227.

2. DELAY, WHEN NOT TREATED AS LACHES. Where a party has a clear right in equity, with no remedy at law, mere delay in bringing his action should not prevent recovery. It should appear that some thing has intervened in consequence of which he would obtain an unconscientious advantage if the relief asked were granted. In the present case land of a debtor was sold under deed of trust, without the trustee being present. The creditor was the purchaser at one-half its value, and immediately took possession, and, without making any improvements, for a period of five years and a half held the the property and received from it a handsome rental. At the end of that time the debtor brought this suit to redeem. *Held*, that under the circumstances the delay was no bar to recovery. *Spurlock v. Sproule*, 503.

LANDS AND LAND TITLES.

ESTATE IN LAND: CONDITION SUBSEQUENT. Land was conveyed to a municipal corporation, to be used as a market place, to be held in fee so long as so used, to revert to the donor when it ceased to be so used, and the donee, upon failure to so use it, to reconvey to the donor. *Held*, that this was not a determinable fee, but an estate held upon condition subsequent; and that the condition, though broken, did not defeat the estate before entry by the donor. *Adams v. Lindell*, 198.

POSSESSION, AS NOTICE OF OCCUPANT'S CLAIM. See Martin v. Jones, 23; See Estates.

LANDLORD AND TENANT.

1. LANDLORD'S LIEN FOR RENT: PRIORITY OF LIENS: EQUITY: NOTICE. The proprietors of a hotel took a lease for a term of years upon an unfinished building to be used, when completed, as part of their hotel. The rent was payable monthly. The lease was to commence, or take effect on the first of the month after the completion of the building. It contained a stipulation that all fixtures, furniture and other improvements should be bound for the rent. When the lease was signed, the house was unfurnished, but before it took effect certain furniture and fixtures had been placed in the house. *Held*, that the stipulation created a lien, valid at least in equity, that this lien was for the full amount of the rent reserved and not simply for any portion that might from time to time become delinquent, and that it had priority of a mortgage given after the lease took effect but before any rent became delinquent, to a person having knowledge of the existence of the stipulation. *Wright v. Bircher*, 179.

2. A MINING LEASE. An instrument which purports, in consideration of a fixed annual rental, to lease *and convey* for a term of years all the coal on or under certain described land, is a mining lease, and authorizes the lessee to take out all the coal he can mine on the premises during the term. It is not an absolute grant of all the coal in the land. *Austin v. The Huntsville Coal & Mining Company*, 535.

3. ———. Mere acceptance of a coal mining lease, without entry made or possession taken of either the land or the coal, vests in the lessee no property in the coal. *Ib.*

4. TRESPASS BY MINING: LEASE. It is no defense to an action for mining and taking coal from under plaintiff's land, that the defendant has made payment for the coal to a person who had a mining lease upon the land, but had never entered nor done any work under the lease. *Ib.*

5. OUTSTANDING LEASE, WHEN NO DEFENSE IN TRESPASS. An action will lie for an injury to the possession of land, notwithstanding there is outstanding an unexpired lease granted by the plaintiff, in the action, provided there is no one in possession under the lease. *Ib.*

6. ———. Under the same circumstances an action will lie for injury to the freehold caused by mining. *Ib.*

7. JUDGMENT: LEASE. Mere recovery of a judgment for rents due upon a mining lease of coal lands does not vest in the lessee the property in the coal; and this is true whether the judgment be satisfied or not. *Ib.*

8. PARTITION. The purchaser of leased land sold under a decree in partition, is entitled to the unpaid rents accruing from the day of sale. *Stevenson v. Hancock*, 612.

LEGISLATIVE POWER.

MUNICIPAL CORPORATION: DELEGATION OF LEGISLATIVE POWER. A town charter authorized the town council to require the citizens to work on the streets in such manner as the council might prescribe by ordinance, not exceeding ten days in each year. *Held*, that it was not necessary for the ordinance to fix the precise number of days that each man should be required to work; this might be left to the overseer of streets, without infringing the rule against the delegation of legislative power. *The Town of Tipton v. Norman*, 380.

LICENSE.

PAROL LICENSE, GOOD AGAINST SUBSEQUENT PURCHASER WITH NOTICE. See Masterson v. The West End Narrow Gauge Railroad Company, 342.

LIEN.

LIEN ON PROPERTY YET TO BE ACQUIRED. One who has in contemplation the purchase of property may by contract impose a lien which will be valid and take effect when the property is acquired. *Wright v. Bircher*, 179.

TRUSTEE'S LIEN FOR ADVANCES TO CESTUI QUE TRUST. See Haydel v. Hurck, 250.

FOR ADVANCES TO DEVISEE. See Smith v. Estes, 310.

LIMITATIONS.

1. STATUTE OF LIMITATIONS, PROOF OF CREDITS AVOIDING. When the statute of limitations is relied on as a defense to a note the plaintiff should not be permitted to read in evidence credits indorsed on the note, without first proving when the indorsements were made. When it is shown that they were made at a time when it was against his interest to make them, or that they were made by or with the consent of the payor, they will be admissible, but not if they were made by the holder himself without the knowledge or consent of the payor, and there is no other proof that the payments were then made. *Goddard v. Williamson's Administrator*, 131.

2. PETITION, WHEN DEMURRABLE: STATUTE OF LIMITATIONS: TENANCY BY COURTESY. If it is impossible to determine from the allegations of the petition whether or not the plaintiff has a cause of action, a demurrer will lie.

Hence, where an action was brought to set aside a deed executed twenty-six years before, and the petition showed that plaintiff's mother, through whom she claimed title, was a minor at the date of execution of the deed, and married and died a minor, leaving plaintiff her only heir, but failed to show whether plaintiff's father survived her mother or not; *Held*, that if the father was still living he was tenant by courtesy, and plaintiff could not maintain her action. If he died before the mother, the action was barred by limitation. If he survived her, but was dead when the action was brought, it was not necessarily barred. For want of a proper allegation as to survivorship, therefore, the petition was demurrable. *Embree v. Patrick*, 173.

3. STATUTE OF LIMITATIONS: TRUSTS. An action against a delinquent trustee who has left the state of his residence, and come into this State, and here studiously concealed his whereabouts, will not be barred by the lapse of a great length of time, (in this case, forty years,) provided it is commenced within the period limited by statute after his whereabouts became known to the beneficiaries. *Butler v. Lawson*, 227.

4. ———: TRUSTEE'S POSSESSION NOT ADVERSE, UNTIL, ETC. Where a trustee purchases property with trust funds, though in his own name, his possession will be deemed the possession of the beneficiaries until he does some unequivocal act denying their right; till then the statute of limitations does not begin to run against them. *Ib.*

5. STATUTE OF LIMITATIONS. The statute of limitations does not begin to run against the estate of a deceased person on a cause of action accruing after his death, until an administrator has been appointed. *Ib.*

6. MILLS AND MILL DAMS: NUISANCE: PRESCRIPTION. The act of 1835 in relation to mills and mill dams, (R. S. 1835, p. 405,) authorizes the appropriation of private property for mill purposes, provides that every dam and mill shall be commenced within one year and finished and ready for business within three years from the date of the order of court authorizing its erection, gives any one injured by a dam erected without legal permission, a right to recover double damages from the owner, and declares that all dams not erected according to the law shall be deemed public nuisances. *Held*, that a dam erected under an order made by authority of this act, but not commenced nor completed within the time fixed by the act, was an unlawful structure, and no lapse of time would legitimate it, or entitle its owner to the protection of the act against other mills. *Huffman v. Vaughan*, 465.

7. OBLIGATION PAYABLE ON DEMAND: DELAY IN DEMAND CONTEMPLATED BY THE CONTRACT: STATUTE OF LIMITATIONS. Where delay in making demand is contemplated by the express terms of an obligation payable on demand, there is no rule of law which requires that the demand be made within the statutory period for bringing an action. Thus, where an obligation for the payment of money one day after date, contained a condition that if the payee should demand payment during her natural life, it should be due and payable; but in case of her death before any or all of the debt should be paid, it should not be paid at all; *Held*, that a demand made by the payee more than ten years after the date of the paper was in time, and that an action brought immediately thereafter, was not barred by limitation. *Jameson v. Jameson*, 640.

LOTTERY.

1. MISSOURI STATE LOTTERY, CONSTRUCTION OF CONTRACT FOR CONDUCTING IT: WHAT WAS AN INTERFERENCE BY THE PUBLIC AUTHORITIES WITHIN ITS MEANING. A contract for carrying on a lottery known as the Missouri State Lottery any where within the limits of the State stipulated that, in the event of any interference by the legislature, judiciary or any other power, so that the parties of the second part could not conduct the business, their obligation to make certain payments called for by the contract should cease. *Quo Warranto* proceedings were subsequently instituted against the conductors of the lottery, in which the circuit court decided that the business was carried on in violation of law and awarded a judgment of ouster. From this judgment an appeal was taken, an appeal bond was given, superseding the judgment, and the judgment remained unenforced, and was finally reversed by the Supreme Court. Pending the appeal, the police of the city of St. Louis, with force and arms, arrested the persons engaged in the business in that city, and destroyed the property and appliances used by them in the business, in consequence of which they desisted from it. *Held*, that the judgment of ouster rendered by the circuit court and the acts of the police were not such interferences as released the payments called for by the contract. Nothing was an interference within the meaning of the contract unless it was done by some legally consti-

tuted power acting within the scope of duties assigned to it, and was of such a character as to have the legal effect of preventing the conduct of the business. The judgment having been superseded by the appeal bond, and finally reversed, never took effect; and the acts of the police were mere trespasses; *Held*, also, that as the right acquired by the contract to operate a lottery was co-extensive with the State, the acts of the authorities of a single municipality did not constitute such interference as was intended by the contract. *The State ex rel. The Attorney General v. France*, 41.

2. EXPIRATION OF LOTTERY FRANCHISE. Where a franchise was granted for a lottery to continue until the sum of $15,000 should be raised, and it appeared that, by the terms of a contract made pursuant to the grant, that sum was due to the beneficiary from the party who had undertaken to conduct the lottery, and there was no evidence that the latter was insolvent; *Held*, that whether the whole of the money was actually paid or not, the franchise had expired, and the beneficiary had no power to continue it in force by making a new contract for raising any part of the $15,000, that might be unpaid under the first contract. *Ib.*

MASTER AND SERVANT.

1. MASTER LIABLE FOR TORTS OF SERVANT, WHEN. It is well settled that to make the master liable for the tortious act of his servant, the act causing injury must have been in the line of the servant's duty and within the scope of his employment. Upon this principle, where the conductor had exclusive control of a railroad train and of all persons on it, but a brakeman, nevertheless, without the knowledge of the conductor, assumed to direct a boy on the train to perform a certain service, and in the attempt to comply with the order the boy was injured; *Held*, that the railroad company was not liable. *Sherman v. The Hannibal & St. Joseph Railroad Company*, 62.

2. ACTION BY FEMALE SERVANT AGAINST MASTER FOR PERSUADING HER TO CONSENT TO ILLICIT INTERCOURSE. A master persuaded his female servant to have sexual intercourse with his minor son, to whom she was at the time engaged to be married. The son afterward refused to fulfill his engagement. *Held*, that these facts afforded the servant no ground of action against the master. *Jordan v. Hovey*, 574.

MECHANICS LIENS.

1. MEASURE OF DAMAGES: MECHANICS LIEN: DEED OF TRUST. In the absence of fraud, malice or oppression, the measure of damages for refusal of a purchaser under a deed of trust to permit a purchaser at mechanics lien sale to remove a building erected after the execution of the deed of trust, (as permitted by section 3 of the mechanics lien law, Wag. Stat., p. 908,) is not the value of the building as it stands, but what it would be worth removed from the land. *Seibel v. Siemon*, 526.

2. RAILROAD: MECHANIC'S LIEN FOR WORK DONE, ETC., OUTSIDE OF THE STATE. There is nothing in the act in relation to mechanic's liens

on railroads, (R. S., § 3200,) restricting the right to a lien to those who perform work or furnish materials within the limits of this State. If part of a railroad lies within and part without this State, a lien may be enforced against that part within the State, though the work was done or materials furnished on the part without. *The St. Louis Bridge & Construction Company v. The Memphis, Carthage & Northwestern Railroad Company*, 664.

3. NEGLECT OF DUTY BY CLERK OF THE COURT. Failure of the clerk of the circuit court to forward to the Secretary of State a copy of an account filed for a mechanic's lien against a railroad, as required by section 3203, Revised Statutes, will not defeat the lien. *Ib.*

MILLS AND MILL DAMS.

1. NUISANCE: PRESCRIPTION. The act of 1835 in relation to mills and mill dams, (R. S. 1835, p. 405,) authorizes the appropriation of private property for mill purposes, provides that every dam and mill shall be commenced within one year and finished and ready for business within three years from the date of the order of court authorizing its erection, gives any one injured by a dam erected without legal permission, a right to recover double damages from the owner, and declares that all dams not erected according to the law shall be deemed public nuisances. *Held*, that a dam erected under an order made by authority of this act, but not commenced nor completed within the time fixed by the act, was an unlawful structure, and no lapse of time would legitimate it, or entitle its owner to the protection of the act against other mills. *Huffman v. Vaughan*, 465.

2. No mill owner whose dam has not been erected according to law can invoke the jurisdiction conferred on the circuit courts by section 25, Wagner's Statutes, page 951, for the protection of his mill and dam against interference by other dams subsequently erected. *Ib.*

3. IF the completion of a mill and dam be delayed more than three years after the entering of an order of court authorizing their erection, the proprietor will, under section 25, Wagner's Statutes, 951, be debarred of any right of action against one subsequently erecting a dam below him, for backing up the water and thereby interfering with the operation of his mill. *Ib.*

MINES.

1. A MINING LEASE. An instrument which purports, in consideration of a fixed annual rental, to lease *and convey* for a term of years all the coal on or under certain described land, is a mining lease, and authorizes the lessee to take out all the coal he can mine on the premises during the term. It is not an absolute grant of all the coal in the land. *Austin v. The Huntsville Coal & Mining Company*, 535.

2. ———. Mere acceptance of a coal mining lease, without entry made or possession taken of either the land or the coal, vests in the lessee no property in the coal. *Ib.*

3. TRESPASS BY MINING: LEASE. It is no defense to an action for mining and taking coal from under plaintiff's land, that the defendant has made payment for the coal to a person who had a mining lease upon the land, but had never entered nor done any work under the lease. *Ib.*

4. OUTSTANDING LEASE, WHEN NO DEFENSE IN TRESPASS. An action will lie for an injury to the possession of land, notwithstanding there is outstanding an unexpired lease granted by the plaintiff, in the action, provided there is no one in possession under the lease. *Ib.*

5. ———. Under the same circumstances an action will lie for injury to the freehold caused by mining. *Ib.*

6. JUDGMENT: LEASE. Mere recovery of a judgment for rents due upon a mining lease of coal lands does not vest in the lessee the property in the coal; and this is true whether the judgment be satisfied or not. *Ib.*

7. MEASURE OF DAMAGES: TORT. In an action for wrongfully mining and taking coal, if it appears that the defendant's act was not willful or grossly negligent, the true measure of damages for the coal taken is its value at the mouth of the shaft, less the cost of severing it from the freehold and delivering it at the mouth. *Ib.*

MISSOURI STATE LOTTERY.

SEE LOTTERY.

MISTAKE.

1. RELIEF IN EQUITY AGAINST MISTAKE OF LAW, WHEN GRANTED. Mere ignorance of the law on the part of a party to a contract will not authorize a court of equity to set aside the contract. There must be something more. The attending circumstances must be such as to excite suspicion of fraud, imposition, misrepresentation or undue influence on one side, and imbecility, credulity or blind confidence on the other. Upon this principle, where it appeared that defendant had believed himself not legally bound to pay plaintiff's claim, but plaintiff's attorney had pressed him for payment, insisting that he was bound, and had prevailed upon him to execute a note for the amount, but it did not appear that he had relied upon the attorney's opinion, nor what were the considerations which induced him to accede to the attorney's demand, and there was no testimony tending to create even a suspicion of fraud, imposition, misrepresentation or undue influence; *Held*, that even if plaintiff's claim was originally unfounded, equity would not relieve defendant from payment of the note. *Dailey v. Jessup*, 144.

2. RELIEF AGAINST MISTAKE IN SHERIFF'S SALE: ACTION AGAINST THE DEFENDANT IN THE EXECUTION. The doctrine of *caveat emptor* does not apply to sheriff's sales where there is a mistake made both by the sheriff and the purchaser, in selling a tract of land to which the defendant in the execution has no title. In such case since the consideration for the money paid on the execution has failed, and the money has gone to extinguish the defendant's debt, the purchaser may recover it back from him; and it is not essential that the purchaser shall have made improvements upon the land, (as was the case in *McLean v. Martin*, 45 Mo. 393;) it is enough if the money has passed out of the sheriff's hands before the mistake is discovered. *Wilchinsky v. Cavender*, 192.

MORTGAGES.

SEE DEEDS OF TRUST AND MORTGAGES.

MUNICIPAL BONDS.

SEE COUNTY BONDS.

TOWNSHIP BONDS.

MUNICIPAL CORPORATION.

1. CITY ORDINANCE—WHAT PAPERS CONSTITUTE A CERTAIN ORDINANCE: PAROL EVIDENCE. A package of papers, consisting of eight half sheets fastened together with ordinary paper fasteners bore on the back of the eighth and last sheet the indorsement, "An ordinance for the establishing of the grades of certain *streets*." On the face of this sheet appeared the title, "An ordinance to re-establish the grades of certain *streets*," the enacting clause, a single section establishing the grade of a single street, the approving clause and the mayor's signature. The other seven sheets contained what purported to be seven sections, one upon each sheet, establishing the grades of as many different streets. At the bottom of the first sheet was a clause purporting to repeal all conflicting ordinances. In the record of ordinances, this ordinance appeared in the same form as in the original; and the entries on the journal of the proceedings of the common council corresponded with the indorsement on the back of the eighth half sheet. *Held*, that this sheet alone constituted the ordinance. It was complete and perfect in itself, while the others lacked the requisite *indicia* of authenticity. The mere fact of their being attached to the eighth, was not sufficient. *Held*, also, that parol evidence could not be received to show that the sheets had been transposed by mistake. Such evidence is inadmissible to point out, explain, rectify or supply any omission sufficiently to authenticate an instrument intended for a city ordinance. *Keating v. Skiles*, 97.

2. CONSTITUTIONAL LAW: SPECIAL ASSESSMENTS FOR MUNICIPAL IMPROVEMENTS. The provisions in the constitution of 1875, relating to the uniformity and equality of taxation, and the taking of private property for public use, were not intended to apply to, and do not effect any change in, the law as to the right of municipal corpora-

tions to make special assessments for local improvements. *Adams v. Lindell*, 198.

3. ST. LOUIS SCHEME AND CHARTER: SPECIAL TAX BILLS. A special tax bill issued under an ordinance approved by the acting mayor and city council of St. Louis, on December 29th, 1876, after the city council was abolished and the new charter adopted, but before the fact was known, is not necessarily void. *Ib.*

4. CAPE GIRARDEAU CITY CHARTER: TAXATION: MERCHANT'S LICENSE. The charter of the city of Cape Girardeau authorized the city to levy taxes for railroad purposes upon "all property in the city made taxable by the general law of the State for State purposes." The 3rd section of the General Statute in relation to merchants' licenses, (Wag. Stat., p. 938,) required that all merchants should pay an *ad valorem* tax, equal to that levied upon real estate, on the highest amount of goods in their possession, whether owned by them or consigned to them for sale, at any time during a certain named period of the year. *Held*, that this statute imposed an indirect tax on property, and not a mere arbitrary charge for the exercise of a privilege; and that the foregoing provision of the charter authorized the city to impose a similar tax, the amount of which should be ascertained in the same way. *The City of Cape Girardeau v. Riley*, 220.

5. MUNICIPAL ORDINANCES MUST CONFORM TO CHARTER AND BE REASONABLE. The ordinances of municipal corporations are subject to revision by the courts; and though large discretion is allowed, yet when an ordinance is found not to be in conformity to charter, or not reasonably incident to powers conceded in the charter, it will be held void. *Ib.*

6. ———: CASE ADJUDGED: TAXATION OF ATTORNEY'S FEES AS COSTS. A city ordinance provided that delinquent city taxes should bear interest at the rate of two per cent per month until paid, and if not paid by a day named, that fifty per cent should be added as a penalty, and if suit should be brought and judgment should be recovered by the city, that there should be taxed as costs against the defendant a fee of $25 for the city's attorney, and in case of appeal to the Supreme Court, a further fee of $50; and these fees were to be so taxed whether the defendant's defense was *bona fide* or frivolous. It appearing in the present case that the defense was *bona fide*, *Held*, that the provision of the ordinance in relation to attorney's fees was unreasonable and unnecessary to carrying out the charter, and the fees should not be allowed. *Ib.*

7. TOWNSHIP ORGANIZATION: DUTY OF TOWNSHIP TRUSTEE. Under the township organization law, (Acts 1873, p. 100, § 2,) the township trustee was but the ministerial officer of the township board of directors, and as such, he was bound to pay any warrant legally drawn by the board, if he had funds in his hands for the purpose. *The State ex rel. Jordon v. Haynes*, 377.

8. ———: POWER OF TOWNSHIP TO BUILD PUBLIC HALL. The township had power under that law to purchase a site and erect upon it a hall in which to transact its corporate business. *Ib.*

9. ———: THIS POWER VESTED IN THE BOARD. The power of selecting a site and erecting a township hall thereon, was vested in the board of directors, and not in the citizens of the township assembled *en masse*. *Ib.*

10. MUNICIPAL ORDINANCE: WORK ON STREETS. A town charter authorized the town to require all male citizens between the ages of twenty-one and fifty to work on the streets. An ordinance was passed by the council imposing this duty only upon those between twenty-one and forty-five. *Held*, that it was not void because it did not include those between forty-five and fifty. *The Town of Tipton v. Norman*, 380.

11. ———: WHAT CONSTITUTES. Where the powers conferred upon a town are to be exercised by ordinances to be passed by the town council, an order or resolution adopted by the council and entered on its records, will be, in point of form, a valid exercise of a power. *Ib.*

12. ———: WORK ON STREETS: DELEGATION OF LEGISLATIVE POWER. A town charter authorized the town council to require the citizens to work on the streets in such manner as the council might prescribe by ordinance, not exceeding ten days in each year. *Held*, that it was not necessary for the ordinance to fix the precise number of days that each man should be required to work; this might be left to the overseer of streets, without infringing the rule against the delegation of legislative power. *Ib.*

13. ———: ———: POWER TO IMPOSE PENALTIES. The power to require work to be done upon the streets as by ordinance the council may prescribe, implies the power of imposing penalties for a failure to work. *Ib.*

14. ———: RE-ENACTMENT. If an ordinance be re-enacted, but not republished as required by charter, the original ordinance remains in force. *Ib.*

15. PROOF OF ORDINANCES. Books which purport to contain the charter and ordinances of a town and are shown to be in the custody of the town clerk, will be received in evidence without further attestation. *Ib.*

16. CHANGE IN PUBLIC CORPORATION: LIABILITY OF NEW FOR DEBTS OF FORMER CORPORATION: JUDGMENT. If a public corporation be abolished by law, and in its stead several new corporations be created, but no provision be made for the payment of existing debts, each of the new corporations becomes liable for all of them; and a judgment against the original corporation is binding upon the new ones. *Hughes v. School District No.* 29, 643.

COUNTY BUILDINGS MAY BE INSURED. See Walker v. Linn County, 650.

NATIONAL BANKS.

DEALINGS BEYOND THEIR CORPORATE POWERS: ESTOPPEL. The maker of a non-negotiable note discounted with a national bank cannot question the right of the bank to recover on it, on the ground that

national banks have no right to deal in that kind of paper. *First National Bank of Trenton v. Gillilan*, 77.

NEGLIGENCE.

1. INSTRUCTION. When the petition charges negligence as the plaintiff's ground of action, and there is no question of unskillfulness on the part of defendant raised either by the petition or the plaintiff's evidence, the plaintiff is not entitled to an instruction as to the effect of unskillfulness on the part of defendant. *Bell v. The Hannibal & St. Joseph Railroad Company*, 50.

2. NEGLIGENCE, WHEN A QUESTION OF FACT, WHEN OF LAW. Where the facts are disputed, the question of negligence is eminently one for the jury, under the instructions of the court; where they are clear and undisputed, it is undoubtedly the province of the court to declare the inference from these facts. *Ib.*

3. RAILROAD: SIGNALS AT PUBLIC CROSSINGS. The requirement of section 806, Revised Statutes, that the bell shall be rung or the whistle sounded at the approach of a railroad train to the crossing of a public highway, is for the benefit of persons on the highway at or approaching the crossing; failure to comply with the statute will furnish no ground of complaint to a person injured on the track at a distance from the highway.

The statute does not require that these warnings shall be continued until the train has passed the crossing, but only until the engine has passed. *Ib.*

4. ———: MAN ON THE TRACK: ENGINEER'S DUTY. An engineer in charge of a moving train has a right to assume that persons past the age of childhood will heed the usual alarm signals. If after giving such signals without effect, he uses such means as in his judgment are, in the emergency, most advisable to prevent collision with a person standing on the track, he is not chargeable with negligence, and the company cannot be held liable for the consequences of a collision, although he failed to use other means which were at hand, provided he is competent and experienced in his business.

In this instance the engineer applied the air brakes to the train, but did not attempt to reverse the engine. *Ib.*

5. ———: NEGLIGENCE: CONTRIBUTORY NEGLIGENCE. The mere fact that a train was moving at a dangerous rate of speed, will not make the company liable for injuries to a person run over by the engine, if he was himself guilty of contributory negligence. *Ib.*

6. NEGLIGENCE: EFFECT OF PLAINTIFF'S YOUTH ON THE RULE OF LIABILITY. The youth of a person injured on a railroad train may excuse him from concurring negligence, but it cannot supply the place of negligence on the part of the company, or extend the liability of the company for tortious acts of its servants. *Sherman v. The Hannibal & St. Joseph Railroad Company*, 62.

7. NEGLIGENCE IN CROSSING RAILROAD TRACK. The plaintiff, a deaf man, being about to cross a railroad track, in a buggy, saw the smoke of what he took to be a moving train east of him. He crossed, drove eastward a distance of 250 feet along a road which

ran parallel with the railroad and within a few feet of it, turned and drove back the same way he had come, attempting to recross the track at the same place. He never looked to the east to ascertain the direction in which the train was moving, but assumed that it was moving away from him. The view to the east was unobstructed for more than half a mile. When in the act of recrossing the track, he was looking back over his shoulder to the southward. In this position he was struck and injured by the train coming from the east. *Held*, that the accident was the result of his own negligence, and the railroad company was, therefore, not liable. *Held*, also, that his deafness was no excuse. It should rather have added a spur to his vigilance, and prompted him to employ his other faculties so as to compensate, as far as possible, for the lacking one. *Held*, also, that although plaintiff was in full view of those operating the train for a long distance, yet they were not chargeable with negligence owing to the fact that the road forked just at the crossing, and they could not anticipate that plaintiff intended to take that branch which crossed the track. *Held*, also, that under the circumstances it was immaterial whether the proper signals for the crossing were given or not. *Purl v. The St. Louis, Kansas City & Northern Railway Company*, 160.

8. RAILROAD: ACTION UNDER THE DOUBLE DAMAGE ACT: NEGLIGENCE. The owner of cattle killed at a public crossing of a railroad through the negligence of the company's servants, cannot recover in an action based on the 43rd section of the railroad law; an instruction submitting the question of negligence in case the jury should find that the killing occurred at such a crossing is, therefore, properly refused, even when asked by the defendant. *Sullivan v. The Hannibal & St. Joseph Railroad Company*, 195.

9. PLEADING NEGLIGENCE. Whatever is the real ground of complaint ought to be distinctly stated in the petition. Hence, in an action against a railroad company to recover for injuries alleged to have been sustained through the company's negligence, if the negligence consisted in having a defective sand-box on the engine and in keeping a defective frog in the track, the petition should not charge negligence in running the cars. (Following *Waldhier v. Railroad Co.*, 71 Mo. 514.) *Edens v. The Hannibal v. St. Joseph Railroad Company*, 212.

10. NEGLIGENCE: CONTRIBUTORY NEGLIGENCE: A CASE FOR THE JURY. Plaintiff went to defendant's railway station for the purpose of helping to carry a trunk for a friend, who was about to take passage on one of defendant's trains. Having bought a ticket, plaintiff and his friend took the trunk to a platform pointed out by the ticket agent. There was at that time no train in sight, but one was due and expected to arrive at any moment. The view of the track was unobstructed as far as a bridge about 400 yards distant in the direction from which the train was to come. Plaintiff and his friend, carrying the trunk between them, were walking in the other direction, along the platform when plaintiff was suddenly struck from behind and severely injured by the bumper of the engine drawing the expected train. The bumper projected eighteen inches over the platform, which was from five to eight feet wide. There were a number of other persons on the platform. The testimony was conflicting as to whether a bell was rung or whistle sounded after the train passed through the bridge; but it tended to show that the grade from the bridge to the platform was an up-grade; that the engine was being

run at an unusual rate of speed; that the engineer, after crossing the bridge, saw the persons on the platform; that he saw plaintiff before he was struck, sounded the alarm whistle and reversed the engine, but the brakes were not put down; that after being struck, plaintiff was carried about eight feet, when the engine stopped. *Held*, that on this testimony the trial court was warranted in submitting to the jury the question whether plaintiff was injured by his own fault or that of defendant. *Langan v. The St. Louis, Iron Mountain & Southern Railway Company*, 392.

11. ———. Negligence is not imputable to a person for failing to look out for danger when under the surrounding circumstances he had no reason to suspect any. *Ib.*

12. PLEADING NEGLIGENCE: FAILURE OF PROOF: VARIANCE: RAILROAD. Where the petition alleges a specific act of negligence as the ground of plaintiff's action, there can be no recovery for any other act. Thus where the specific negligence alleged was the failure of a railroad company to stop its train at plaintiff's station long enough for him to alight; *Held*, that he could not recover upon proof that the injuries for which he sued were sustained by reason of the company's failure to keep the platform lighted. *Waldhier v. The Hannibal & St. Joseph R. R. Co.*, 71 Mo. 514.

But, per NORTON, J., dissenting: In order to avail himself of this principle, the defendant must pursue one of three courses at the trial: 1st, Object to the introduction of evidence when offered; or, 2nd, Ask an instruction excluding it from the consideration of the jury; or, 3rd, File an affidavit stating that he is surprised by its introduction, and wherein. *Price v. The St. Louis, Kansas City & Northern Railway Company*, 414.

13. RAILROAD: PASSENGER ALIGHTING FROM MOVING TRAIN. Whether a railroad company which fails to bring its train to a full stop at a station, shall be held liable in damages for injuries sustained by a passenger in attempting to get off, depends upon whether under all the circumstances it was prudent for him to make the attempt. *Ib.*

14. CONTRIBUTORY NEGLIGENCE. Though the plaintiff was guilty of negligence contributing to his injury, yet the defendant will be liable if, after becoming aware of plaintiff's danger, he could have prevented the injury by the use of ordinary care, skill and caution, and failed to do so. An instruction to this effect should not, however, be given in a case where the injury occurred simultaneously with the appearance of the danger. *Ib.*

15. RAILROAD: DANGEROUS CROSSING: EMPLOYMENT OF FLAGMAN: NEGLIGENCE. Railroad companies are not bound to station flagmen at the crossing of public highways, no matter how dangerous. If the bell is rung, or the whistle sounded, as the train approaches the crossing, in compliance with section 806, Revised Statutes, a company fulfills its whole duty, except, perhaps, in a case where the crossing is of such a character that the employment of a flagman is one of the common and usual means of warning adopted by prudent railroad companies. In such case the omission to employ one might be negligence. *Welsch v. The Hannibal & St. Joseph Railroad Company*, 451.

NEGOTIABLE PAPER.

See Promissory Notes.

NOTICE.

1. Possession of land, as notice of occupant's claim of title. One who has knowledge of the fact that land is in the actual possession of another, is thereby put upon inquiry as to the rights of the occupant, and if he purchases, will be held to take with notice of those rights. *Martin v. Jones*, 23.

2. Knowledge of attorney as affecting his client. Knowledge acquired by an attorney while acting for one client, will not affect another client for whom he is acting at the same time, in a different case, *Ford v. French*, 250.

Notice of prior lien. See Wright v. Bircher, 179.

——— of prior parol license. See Masterson v. The West End Narrow Gauge Railroad Company, 342.

Notice to produce papers. See Cross v. Williams, 577.

NUISANCE.

1. Private nuisance: damages. Where the owner knowingly permits a brothel to be established and maintained in his house, which adjoins a tenement of another, by reason of which the latter's tenants leave, and his property is depreciated in value, the former is liable to the latter for the special damage thereby caused him, over and above the wrong and injury done to the general public. *Givens v. Van Studdiford*, 129.

2. ———: measure of damages. In such a case the measure of damages is the difference in the selling value of the property and the loss of rent occasioned by such nuisance. *Ib.*

3. ———: ———: evidence of damage. In ascertaining these facts, all circumstances that would show a depreciation in value should be considered, and the damage recovered must be the actual depreciation shown to be caused by the existence of the nuisance. *Ib.*

4. ———: ———. Where it is shown that, after defendant's house was occupied as a brothel, other houses of the same character were opened in the same neighborhood, so that the damage caused by others cannot be separated from that caused by defendant, he will be liable for all such damage, if the natural and probable consequence of his illegal act was to cause the injury complained of. *Ib.*

Mill dam, when a nuisance. See Hoffman v. Vaughan, 465.

Flooding land by construction of railroad. See Munkres v. The Kansas City, St. Joseph & Council Bluffs Railroad Company, 514.

NUNC PRO TUNC ENTRIES.

1. In the absence of anything to show that an order or judgment as made by the court was different from that actually entered, no correction can be made in the latter by a *nunc pro tunc* entry at a subsequent term. A mere erroneous judgment cannot be thus corrected. *Fetters v. Baird*, 389.

2. NUNC PRO TUNC ORDERS. If there is a discrepancy between the judgment of the probate court allowing a demand against the estate of a decedent and the entries made by the clerk on the back of the demand and in the book of abstracts of allowances, the latter may, by a *nunc pro tunc* order, be made to conform to the judgment. *Ritchey v. Withers*, 556.

3. NUNC PRO TUNC ORDERS: CORPORATION. A judgment against a corporation cannot be corrected *nunc pro tunc* by striking out the name under which the defendant was sued and served with process, and substituting another name. *Brown v. The Terre Haute & Indianapolis Railroad Company*, 567.

OFFICE.

1. BRIBERY OF THE PUBLIC BY CANDIDATE. It is unlawful for a candidate for public office to make offers to the voters to perform the duties of the office, if elected, for less than the legal fees. An election secured by means of such offers is void. *The State ex rel. Attorney General v. Collier*, 13

2. DE FACTO OFFICER: CONTRACT: ELECTION. The rule as to the validation of the acts of *de facto* officers is one of policy, and may be applied, not only where there is no *de jure* officer, but where the legal office itself no longer exists. Where the person claiming to hold the office is not a mere usurper, but, owing to a mistake of fact, held under a perfect color of right, which justified men in concluding that he was a legal officer holding a legal office, and where the fact that the office was abolished remained, for a long time, unknown, owing to a false announcement of election returns, his acts as such officer, done after the abolition of the office and before the fact was known, may be validated for the purpose of supporting contracts made with him where money and labor have been expended on the faith of his authority to act and contract as such officer. *Adams v. Lindell*, 198.

3. CITY COLLECTOR: TWO INCUMBENTS IN ONE TERM: COMPUTATION OF FEES. A city ordinance of St. Louis provided that the city collector should receive for his services two and one-half per cent on all moneys collected, until the amount collected should reach $300,000; three per cent on an additional $100,000, and five per cent on all other sums collected in each fiscal year, over said amounts. There having been two successive incumbents of the office of city collector during one fiscal year; *Held*, that in determining the rate at which the commissions of the latter incumbent were to be computed, the collections made by his predecessor should be taken into account. *Lemoine v. The City of St. Louis*, 404.

4. DURATION OF LIABILITY OF SURETIES ON AN OFFICIAL BOND. The sure-

ties on the bond of an officer, who by law holds until his successor is elected and qualified, remain liable so long as he continues to hold the office, though that be beyond the term for which he was elected. *Long v. Seay*, 648.

SURETIES IN CASHIER'S BOND, NOT LIABLE AFTER HIS RE-ELECTION. See The Savings Bank of Hannibal v. Hunt, 597.

PARENT AND CHILD.

CONVEYANCE BY CHILD TO PARENT: UNDUE INFLUENCE: BURDEN OF PROOF. A voluntary conveyance by a child to its parent while still under the parental control, is presumptively void. The burden is upon the parent to show, in the clearest and most satisfactory manner, that it is in every particular worthy of receiving the sanction of a court of equity. A voluntary conveyance made by a daughter to her father before marriage was in this case assailed by her and her husband as having been obtained through undue influence. She testified that her father used no improper or undue influence of any nature to induce her to sign the deed; that he never even spoke to her on the subject until after the deed was prepared and she was about to execute it; that her brother, who joined in the deed, conveying his equal interest in the same property, first suggested the propriety of the step, and that she readily assented. She was at the time three years and three months past her majority. She was, however, living in her father's house. The deed conveyed an estate for her father's life in all the property she had. It was executed when she was on the eve of marriage, improvidently, without time or opportunity for proper reflection, and without any independent advice. *Held*, that it must be set aside. *Miller v. Simonds*, 669.

AGREEMENT BETWEEN FATHER AND SON FOR CONVEYANCE IN CONSIDERATION OF SERVICE AND SUPPORT. See Hiatt v. Williams, 214.

PARTIES.

1. DEFECT OF PARTIES: PRACTICE: AMENDMENT. A suit should not be dismissed for defect of parties. Section 3568, Revised Statutes, makes it the duty of the court when such defect is ascertained to exist, to order the necessary parties to be brought in either by an amendment of the petition, or by a supplemental petition and new summons. *Butler v. Lawson*, 227.

2. ——: ——: PLEADING. The objection of defect of parties can be taken by demurrer or answer only, (R. S., § 3519,) not by motion to dismiss. *Ib.*

3. PARTIES: TRUSTS: PRACTICE: ADMINISTRATION. Where a misappropriated trust fund consists in part of personal property, both the administrator and the heirs of a deceased beneficiary are necessary and proper parties to an action to recover it. *Ib.*

4. ——: ——: ——. Where a misappropriated trust fund con-

sists in part of real and in part of personal property, the heirs and the legal representatives of all the beneficiaries may sue jointly to recover the whole in one action. *Ib.*

5. ASSIGNMENT OF CAUSE OF ACTION PENDING SUIT: PROPER PARTY PLAINTIFF. The plaintiff does not, by assigning his cause of action between the filing of the petition and the issuing of the summons, lose his right of recovery. The court, however, may properly permit the assignee to be substituted as plaintiff in the action. *Spurlock v. Sproule*, 503.

6. MISJOINDER OF PARTIES: REMEDY OF JOINT OWNERS. Where property, against which proceedings to condemn for public use have been instituted and afterward abandoned, belonged to A & B, cotenants, who in resisting the proceedings employed different counsel, who severally attended to the management of the case; *Held*, that it was error to permit them to sue jointly to recover damages for counsel fees. *Leisse v. The St. Louis & Iron Mountain Railroad Company*, 561.

7. CONTRACT, IN FORM JOINT, WHEN SEVERAL: PARTY TO SUIT: COVENANT OF INDEMNITY. Where a contract with two or more persons, though in form joint, is founded upon a separate consideration moving from each, and there is nothing to exclude the inference that it was intended to be several, it will be so construed, and any one of the parties may maintain an action on it for a breach affecting himself only. Thus, where one of the sureties in an official bond covenanted to indemnify his co-sureties against liability on the bond, and one of the latter was compelled to pay part of a defalcation of the principal; *Held*, that he could sue alone upon the covenant. *Cross v. Williams*, 577

8. REORGANIZATION OF SCHOOL DISTRICTS: LIABILITY OF NEW FOR DEBTS OF FORMER: JUDGMENT. If a public corporation be abolished by law, and in its stead several new corporations be created, but no provision be made for the payment of existing debts, each of the new corporations becomes liable for all of them; and a judgment against the original corporation is binding upon the new ones. *Hughes v. School District No.* 29, 643.

PARTITION.

1. SALE AFTER EXPIRATION OF ORDER OF SALE IS VOID. An order of sale in partition expires with the term at which the sale is required to be made, and if for want of bidders, no sale takes place at that term, a renewal of the order must be procured before any further steps can be taken. A sale at a subsequent term without such renewal is void. *Hughes v. Hughes*, 136.

2. PARTITION CONSTITUTES NO ESTOPPEL IN FAVOR OF STRANGERS. Where there are conflicting surveys of an ancient lot now divided into several parcels, and the parties claiming one of the parcels enter into a partition of it among themselves according to the metes and bounds fixed by one of the surveys, this will not be such an acceptance of that survey as will conclude these parties from asserting

the correctness of the other in an action between them and a stranger to the deed, involving title to one of the other parcels. *Glasgow v. Baker*, 441.

3. PARTITION. The purchaser of leased land sold under a decree in partition, is entitled to the unpaid rents accruing from the day of sale. *Stevenson v. Hancock*, 612.

4. PARTITION: JUDGMENT. The rights of a stranger purchasing at a sale under a decree in partition, cannot be affected by recitals in the decree as to the rights and liabilities of the parties thereto among themselves. Such recitals are, therefore, no evidence against him. *Ib.*

PARTNERSHIP.

1. SETTLEMENT OF PARTNERSHIP ACCOUNTS: PRACTICE. When a partnership is created for a joint undertaking, each partner to collect certain proceeds, and the entire receipts to be shared upon a basis fixed in the agreement, any claim preferred by one against the other for a share of proceeds unfairly withheld, is the proper subject for the taking of an account, to ascertain the various items of receipt and disbursement by either partner, to compare them together, and strike the proper balance. But if the parties themselves have cast up the items, and agreed upon the state of the account and the resulting balance either way, there is no further account to be taken, unless upon a suggestion of fraud, mistake or omission, operating to falsify their conclusion; and the court cannot interfere with the result thus settled by the parties. *Silver v. The St. Louis, Iron Mountain & Southern Railway Company*, 194.

2. PARTNERSHIP: JOINT TRANSACTION: PLEADING: EQUITY: REFERENCE: JURY TRIAL. Plaintiffs and defendant being both common carriers and owning connecting lines, made an agreement in relation to the transportation of two cargoes of goods over their lines, estimated the amount of freights to be collected by each and the profits to be realized on the whole transaction and struck a balance. Plaintiffs then paid defendant in advance what it was estimated would come into their hands by way of collection in excess of their share of the profits. One of the cargoes was subsequently destroyed, in consequence of which part of the estimated profits were never realized. Plaintiffs claiming that the enterprise was a partnership transaction, then sued to recover the amount of their advance and their share of the profits actually realized. The petition also contained a prayer for an accounting. The answer did not dispute the correctness of the several items which entered into the settlement or the accuracy of the balance ascertained, but denied the partnership and averred that defendant's share in the undertaking consisted in the rendering of services to plaintiffs, and that the money paid defendant was paid for such services. *Held*, that the issues joined were properly triable by a jury, and that the case was not one for reference or triable by the court. Plaintiffs' demands were of such a nature that they could have been recovered at common law under the counts for money had and received and account stated; and the prayer for an accounting did not change their nature. *Ib.*

3. If two parties enter into a joint undertaking, and one of them fails to perform his part of the work, the expense of having it done by another is chargeable to him and not to his partner. *Stegman v. Berryhill*, 307.

PASSENGER.

See Railroads.

PATENT.

Exemplified copy as evidence. An exemplification of the record of a patent from the United States showing that the patent was signed by the President, by his initials, and countersigned by the Commissioner of the General Land Office, by his initials, is admissible in evidence as a copy of the patent. *Briggs v. Holmstrong*, 337.

PAYMENT.

Promissory note: effect of a stranger taking up a note. If one not a party to nor liable upon a note takes it up with his own money, the transaction will be deemed a purchase, and not a payment, if such was the intention of the parties; and this is the rule, whatever may have been the mode adopted of accomplishing the result.

In this case one H., who had assumed to pay certain notes secured by a deed of trust on real estate, in order to prevent a foreclosure, procured a bank to take up the notes. The arrangement was that the bank should take the note of one B. with the real estate notes as collateral security. B. accordingly executed his note and sent it to the bank. The holder of the real estate notes also sent them to the bank accompanied by a draft on H. for the amount due upon them. The bank paid the amount, and took the notes; *Held*, that the transaction amounted to a purchase and not to a payment. *Swope v. Leffingwell*, 348.

PHYSICIANS.

See Druggists.

PLEADING.

1. Petition, when demurrable: statute of limitations: tenancy by courtesy. If it is impossible to determine from the allegations of the petition whether or not the plaintiff has a cause of action, a demurrer will lie.

Hence, where an action was brought to set aside a deed executed twenty-six years before, and the petition showed that plaintiff's mother, through whom she claimed title, was a minor at the date of execution of the deed, and married and died a minor, leaving

plaintiff her only heir, but failed to show whether plaintiff's father survived her mother or not; *Held*, that if the father was still living he was tenant by courtesy, and plaintiff could not maintain her action. If he died before the mother, the action was barred by limitation. If he survived her, but was dead when the action was brought, it was not necessarily barred. For want of a proper allegation as to survivorship, therefore, the petition was demurrable. *Embree v. Patrick*, 173.

2. PLEADING NEGLIGENCE. Whatever is the real ground of complaint ought to be distinctly stated in the petition. Hence, in an action against a railroad company to recover for injuries alleged to have been sustained through the company's negligence, if the negligence consisted in having a defective sand-box on the engine and in keeping a defective frog in the track, the petition should not charge negligence in running the cars. *Edens v. The Hannibal & St. Joseph Railroad Company*, 212.

3. A motion to dismiss on the ground that the petition does not state facts sufficient to constitute a cause of action, like a general demurrer, is deemed to confess the truth of the allegations and deny only their legal sufficiency. *Butler v. Lawson*, 227.

4. NEGLIGENCE: PLEADING: FAILURE OF PROOF: VARIANCE: RAILROAD. Where the plaintiff alleges a specific act of negligence as the ground of plaintiff's action, there can be no recovery for any other act. Thus where the specific negligence alleged was the failure of a railroad company to stop its train at plaintiff's station long enough for him to alight; *Held*, that he could not recover upon proof that the injuries for which he sued were sustained by reason of the company's failure to keep the platform lighted.

But, per NORTON, J., dissenting: In order to avail himself of this principle, the defendant must pursue one of three courses at the trial: 1st, Object to the introduction of evidence when offered; or, 2nd, Ask an instruction excluding it from the consideration of the jury; or 3rd, File an affidavit stating that he is surprised by its introduction, and wherein. *Price v. The St. Louis, Kansas City & Northern Railway Company*, 414.

5. PRAYER FOR RELIEF. If the answer contains a prayer for general relief, the court may give any relief consistent with the case made by the answer. *Snider v. Coleman*, 568.

6. GENERAL ISSUE IN EJECTMENT: ESCROW: DEED OF TRUST. Under the general issue in ejectment, the defendant may show that a deed of trust under which plaintiff claims was delivered as an escrow and not absolutely, and that the sale thereunder was made at the wrong place. Neither of these is an equitable defense, requiring to be specially pleaded. *Goff v. Roberts*, 570.

7. PLEADING: CONTRACT. In declaring upon a contract it is only necessary to state so much of it as relates to the point of which complaint is made; beyond that it is useless to go. But the omission of any part of the contract which materially qualifies and alters the legal nature of the promise which is alleged to have been broken, will be fatal. *Moore v. Mountcastle*, 605.

8. CONTRACT: MEASURE OF DAMAGES: PLEADING. In an action for breach of contract to come from Tennessee to Missouri to work on defendant's farm, plaintiff may recover for loss of time and the actual expense incurred in coming, without any specific allegation of such damages in his petition. *Ib.*

9. JEOFAILS. Omission to state directly in a petition in replevin that the property in controversy is in the possession of defendant, will be deemed cured, at least after verdict, if there is an averment that the defendant wrongfully detains it. So, also, if the answer confesses the fact, though only by implication. *Garth v. Caldwell*, 622.

10. OMISSION to state a material fact will be obviated if the pleading of the opposite party puts the matter in issue. *Ib.*

PLEADING, CRIMINAL.

AVERMENT OF AGENCY IN INDICTMENT FOR EMBEZZLEMENT. See The State v. Dodson, 283.

AN INDICTMENT FOR RAPE, HELD SUFFICIENT. See The State v. Hatfield, 518.

AN INDICTMENT FOR OBSTRUCTING A HIGHWAY, HELD SUFFICIENT. See The State v. Risley, 609.

PLEDGE.

PLEDGE OF STOCK: PLEDGEE'S LIABILITY. Section 9, page 301, Wagner's Statutes, in relation to railroad companies, provides that "no person holding stock in any such company * * as collateral security, shall be personally subject to any liability as a stockholder of such company; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly." *Held*, that this section has no application to stock which has not been issued in the usual course of business, and, therefore, does not exempt from liability a person holding as collateral security unsubscribed stock issued to him by the company. NORTON, J., dissenting. *Griswold v. Seligman*, 110.

POLICE.

TRESPASSES BY THE POLICE. See The State *ex rel.* The Attorney General v. France, 41.

PRACTICE.

1. INJUNCTION, IMMATERIAL IRREGULARITY IN. It is no objection to the validity of a decree for a perpetual injunction made upon a

final hearing in the circuit court, that a temporary injunction has at the beginning of the case been issued by the clerk of the circuit court in pursuance of an order of the probate court, it appearing that the latter court had jurisdiction to grant temporary injunctions. *Martin v. Jones*, 23.

2. PRACTICE. This court cannot review the action of the trial court in striking out part of defendant's answer, unless the record shows that objection was made and exceptions saved at the proper time, and there is something in the record to identify the part stricken out. *Ib.*

3. AMENDMENT. On the trial in the circuit court of a case appealed from the probate court plaintiff asked, but the court refused, leave to file an amended statement of his cause of action. The proposed amendment did not change the cause of action, but simply consisted of credits, whereby plaintiff's demand would be reduced, but the plea of the statute of limitations would be avoided. The application was accompanied by plaintiff's affidavit showing why he had failed to give these credits before. *Held*, that the application should have been granted. Amendments are favored in furtherance of justice. *Goddard v. Williamson's Administrator*, 131.

4. PARTNERSHIP: JOINT TRANSACTION: PLEADING: EQUITY: REFERENCE: JURY TRIAL. Plaintiffs and defendant being both common carriers and owning connecting lines, made an agreement in relation to the transportation of two cargoes of goods over their lines, estimated the amount of freights to be collected by each and the profits to be realized on the whole transaction and struck a balance. Plaintiffs then paid defendant in advance what it was estimated would come into their hands by way of collection in excess of their share of the profits. One of the cargoes was subsequently destroyed, in consequence of which part of the estimated profits were never realized. Plaintiffs claiming that the enterprise was a partnership transaction, then sued to recover the amount of their advance and their share of the profits actually realized. The petition also contained a prayer for an accounting. The answer did not dispute the correctness of the several items which entered into the settlement or the accuracy of the balance ascertained, but denied the partnership and averred that defendant's share in the undertaking consisted in the rendering of services to plaintiffs, and that the money paid defendant was paid for such services. *Held*, that the issues joined were properly triable by a jury, and that the case was not one for reference or triable by the court. Plaintiffs' demands were of such a nature that they could have been recovered at common law under the counts for money had and received and account stated; and the prayer for an accounting did not change their nature. *Silver v. The St. Louis, Iron Mountain & Southern Railway Company*, 194.

5. IF the reply fails to deny allegations of the answer, which, if true, are sufficient to defeat the action, defendant should avail himself of the omission in proper time. It will be too late after verdict and judgment. *The St. Joseph Fire & Marine Insurance Company v. Harlan*, 202.

6. REFEREE'S REPORT. A second report made by a referee after the first has been disapproved and the case has been re-referred to him,

cannot be treated as an amendment of the first. *Johnson v. Lony*, 210.

7. MISCONDUCT OF JUDGE OF TRIAL COURT. The court disapproves the language in which the circuit judge urged the jury in this case to agree upon a verdict, as being manifestly prejudicial to the defendant. *Edens v. The Hannibal & St. Joseph Railroad Company*, 212.

8. MOTION FOR REHEARING, WHEN UNNECESSARY. A motion for rehearing is not necessary to enable the Supreme Court to review the action of the trial court in sustaining a motion to exclude the plaintiff's evidence and dismiss the suit on the ground that the petition does not state facts sufficient to constitute a cause of action. *Butler v. Lawson*, 227.

9. DEFECT OF PARTIES: PRACTICE: AMENDMENT. A suit should not be dismissed for defect of parties. Section 3568, Revised Statutes, makes it the duty of the court when such defect is ascertained to exist, to order the necessary parties to be brought in either by an amendment of the petition, or by a supplemental petition and new summons. *Ib.*

10. ———: ———: PLEADING. The objection of defect of parties can be taken by demurrer or answer only, (R. S., § 3519,) not by motion to dismiss. *Ib.*

11. SERVICE OF PETITION FOR REVIEW OF JUDGMENT BY DEFAULT ON PUBLICATION: ATTACHMENT. A petition for review of a judgment in attachment rendered by a justice of the peace upon publication of notice without service of summons or appearance of defendant to the action, must be served upon the plaintiff in person. Service upon his attorney will not be sufficient. R. S., §§ 457, 458. *Allen v. The Singer Manufacturing Company*, 326.

12. SERVICE BY LEAVING AT USUAL PLACE OF ABODE. A return which shows that the process was served by being left "at the Hardin House, * * the usual place of abode of the within named H. B. A., prior to the time he left this State, and became a non-resident," is not sufficient under a statute which authorizes service by leaving the writ at the usual place of abode. *Ib.*

13. NUNC PRO TUNC ENTRIES. In the absence of anything to show that an order or judgment as made by the court was different from that actually entered, no correction can be made in the latter by a *nunc pro tunc* entry at a subsequent term. A mere erroneous judgment cannot be thus corrected. *Fetters v. Baird*, 389.

14. AFFIDAVIT FOR APPEAL SWORN TO BY AGENT. An affidavit for appeal made by one not a party to the suit, need not show upon its face that the affiant is the appellant's agent. If this fact appears by a deposition read in the case it will be sufficient. *Melcher v. Scruggs*, 406.

15. DEFAULT. If one of several defendants makes no answer, either the suit should be dismissed as to him, or a judgment should be entered by default. *Ib.*

16. EVIDENCE: INSTRUCTION. The fact that evidence irrelevant to the issue as made by the pleadings is admitted without objection, does not authorize the court to instruct the jury that they may find a verdict upon that evidence. *Price v. The St. Louis, Kansas City & Northern Railway Company*, 414.

17. VARIANCE. If there be a discrepancy between a note offered in evidence and the one declared on in the petition, and defendants are misled thereby, they should take advantage of the variance by affidavit as provided by Wagner's Statutes, page 1033, § 1. *Ferris v. Thaw*, 446.

18. ASSIGNMENT OF CAUSE OF ACTION PENDING SUIT: PROPER PARTY PLAINTIFF. The plaintiff does not, by assigning his cause of action between the filing of the petition and the issuing of the summons, lose his right of recovery. The court, however, may properly permit the assignee to be substituted as plaintiff in the action. *Spurlock v. Sproule*, 503.

19. ATTACHMENT FOR WITNESSES. A court commits no error in refusing to issue an attachment for witnesses, where it appears that if issued it could not be served during the term, nor in refusing to await service of an attachment when the witness is too sick to be brought into court, nor where, by consent of opposing counsel, a statement of what the witness, if present, would swear to is read to the jury as his testimony. *The State v. Hatfield*, 518.

20. CONTINUANCE: WITNESS. An application for continuance on the ground of absence of a witness, is properly refused, if the adverse party will admit that a statement prepared by the party applying may be read to the jury as truly setting forth what the witness, if present, would swear. *Ib.*

21. EVIDENCE. Where it does not appear from anything in the record that testimony offered after the close of the evidence was material, this court cannot say that the trial court has abused its discretion in refusing to open the case in order to let in the testimony. *Ib.*

22. DEED: EVIDENCE: PRACTICE. Failure to object to the admission of a deed in evidence concedes its execution but not its legal effect. *Bartlett v. O'Donoghue*, 563.

23. NUNC PRO TUNC ORDERS: CORPORATION. A judgment against a corporation cannot be corrected *nunc pro tunc* by striking out the name under which the defendant was sued and served with process, and substituting another name. *Brown v. The Terre Haute & Indianapolis Railroad Company*, 567.

24. LOST WRITING: PRACTICE: ORDER OF PROOF. In a suit upon a writing alleged to be lost, the court admitted evidence of the contents of the writing first, and of its loss afterward; *Held*, not reversible error. *Cross v. Williams*, 577.

25. ———: NOTICE TO PRODUCE: SECONDARY EVIDENCE. In a suit upon a written instrument, the petition alleged that the writing was either lost or destroyed or in the possession of the defendant. *Held*, that

this dispensed with the necessity of notice to produce the writing as a foundation for the introduction of secondary evidence. *Ib.*

26. ORDER OF ARGUMENT. The order of argument is a matter to be regulated by rule of court. Where plaintiff's counsel, being entitled to make the opening address to the jury, declines to do so, it will not be error of which the defendant can complain if the court refuses to allow his counsel to close. *Blewett v. The Wyandotte, Kansas City & Northwestern Railroad Company*, 583.

27. HARMLESS ERROR IN ADMITTING EVIDENCE AND GIVING INSTRUCTIONS. When a case is tried by the court below without a jury, the judgment will not be reversed for error in the admission of irrelevant evidence if there is enough relevant evidence in the record to sustain the finding, and the declarations of law given by the court are correct; nor for error in declaring the law, where it is manifest from the record that the judgment is right. *Moore v. Mountcastle*, 605.

28. PLEADING. Even if it were necessary that a petition in replevin for corn in the stalk should show that the corn had matured, yet a failure to do this could not be taken advantage of after verdict. *Garth v. Caldwell*, 622.

29. REPLEVIN: VERDICT. Where the plaintiff in replevin has the property in possession, a general verdict in his favor without an assessment of damages is not an error of which defendant can complain. *Ib.*

30. BILL OF EXCEPTIONS. A party intending to appeal presented to the judge of the trial court a bill of exceptions which the judge refused to sign. To this refusal an exception was taken and another bill of exceptions was tendered, wherein was incorporated the former bill. The judge signed the second bill. *Held*, that this did not bring up for review the questions designed to be raised by the original bill. The exceptor's remedy, if the trial term had not lapsed, was to have the original bill signed by by-standers; if it had lapsed, a proceeding by mandamus to compel the judge to sign. *Ib.*

APPEAL BOND. See Long v. Dismer, 655.

PRACTICE, CRIMINAL.

1. ASSISTANT TO PROSECUTING ATTORNEY. It is not error to permit an attorney assisting the State's attorney in the prosecution of a criminal case to make the opening statement to the jury. R. S., § 1908. *The State v. Stark*, 37.

2. CERTAIN remarks made by the prosecuting attorney in his closing address to the jury. *Held*, not to have been of such a character as to prejudice the defendant, or call for a reversal of the judgment. *Ib.*

3. CONDUCT OF JURORS AND BAILIFF IN CHARGE OF JURY. While it is improper for a juror in a criminal case to ask advice of the

officer in charge of the jury in relation to the case, and equally improper for the officer to communicate such inquiry to the prosecuting attorney, yet if the officer made no response to the juror, and it is shown that the defendant was not in any way prejudiced, such inquiry of the officer and communication by him to the prosecuting attorney will furnish no ground for setting aside a conviction. *Ib.*

4. ALLOCUTION OF THE JUDGE IN CASES NOT CAPITAL. On a conviction of an offense not capital, the omission to enter of record the allocution, or formal address of the judge to the prisoner asking him if he has anything to say why sentence should not be pronounced against him, is not an error for which the judgment should be reversed. *Ib.*

5. JURORS NOT DISQUALIFIED BY HAVING READ NEWSPAPER REPORTS. A person is not disqualified from serving as juror by reason of the fact that he has read newspaper accounts of the case, which created impressions that would require evidence to remove. *The State v. Greenwade*, 298.

6. COURTS: DISQUALIFICATION OF JUDGE FOR PREJUDICE. Section 1877, Revised Statutes, which provides that the judge of any court in which any criminal prosecution shall be pending, shall be incompetent to try the case, if the defendant shall file his affidavit supported by the affidavits of two reputable persons not of kin to or counsel for him that the judge will not afford him a fair trial, applies only to the regular judge. After the defendant has thus disqualified the regular judge, and the judge of another circuit has been called in under section 1881, Revised Statutes, to try the case, he cannot be disqualified in the same way. *Ib.*

7. INSTRUCTIONS. If a jury in a criminal case assess against the defendant a punishment authorized by law for the crime with which he is charged, it will be no ground for setting aside the verdict, that the court in its instructions under-stated the maximum punishment permitted, and authorized the jury to impose other punishments not permitted by law. *The State v. Gann*, 374.

8. OBJECTION to the sufficiency of an indictment can be taken only by motion to quash, demurrer or motion in arrest; not, as in civil cases, by objecting *ore tenus* to the introduction of evidence. *The State v. Risley*, 609.

9. STATE'S APPEAL. The State has no right of appeal in a case where, on motion made *ore tenus* to exclude evidence, the trial court holds the indictment bad, and on that ground enters judgment for defendant. *Ib.*

PRACTICE IN THE SUPREME COURT.

1. PRESUMPTION IN FAVOR OF ACTION OF TRIAL COURTS. Where the bill of exceptions states that the court made its finding upon the evidence and after hearing argument, but no evidence is preserved, this court will not disturb the finding on the ground that it is unsupported by evidence. The presumption will be indulged that the evidence was sufficient. *Johnson v. Long*, 210.

2. ——: REFEREE'S REPORT. This court refuses to review the action of the trial court upon exceptions to the report of a referee, charging that the report did not contain all the evidence taken, and that the referee's conclusions were not supported by the evidence. *Ib.*

3. WHERE an unobjectionable instruction submitted to the jury an issue upon which the verdict might properly have been found, the judgment will not be reversed because another instruction was given which presents a different issue, based only upon evidence which, in the opinion of this court, would not have authorized the verdict. If it cannot be said that there is absolutely no evidence upon which the instruction could be predicated, the judgment must stand. *Noffsinger v. Bailey*, 216.

4. WEIGHT OF EVIDENCE. Where there is any evidence to support a verdict, this court will not disturb the judgment simply because it appears to be against the weight of evidence. *Rea v. Ferguson*, 225.

5. VERITY OF THE TRANSCRIPT. No matter how palpable may be the error in an instruction, as it appears in the transcript, this court is bound to accept the transcript as true, and to reverse for the error. It cannot assume that the error is a mere mistake of the clerk. *Stegman v. Berryhill*, 307.

6. OBJECTION to the sufficiency of an affidavit for appeal must be taken by motion to dismiss before the case is submitted on its merits. After submission this court will not go behind the order granting the appeal to determine whether the affidavit is sufficient or whether any affidavit whatever was filed. *The St. Louis Bridge & Construction Company v. The Memphis, Carthage & Northwestern Railroad Company*, 664.

PRESUMPTION.

PRACTICE IN THE SUPREME COURT: PRESUMPTION IN FAVOR OF ACTION OF TRIAL COURTS. Where the bill of exceptions states that the court made its finding upon the evidence and after hearing argument, but no evidence is preserved, this court will not disturb the finding on the ground that it is unsupported by evidence. The presumption will be indulged that the evidence was sufficient. *Johnson v. Long*, 210.

PRINCIPAL AND AGENT.

1. LIABILITY OF UNDISCLOSED PRINCIPAL: ABORTIVE CORPORATION. If an agent authorized to execute a promissory note, executes it in his own name, whether he discloses his agency or not, his principal may be sued on the note, unless it is clear that both parties to the note intended that the agent alone should be liable; and parol evidence is admissible to prove the intent.

In this case members of a Masonic Lodge which had made an abortive attempt to become incorporate, were held liable upon a note executed by the officers of the lodge for the purposes of the lodge, with the approval of the members. *Ferris v. Thaw*, 446.

2. RATIFICATION OF ACTS OF AGENT. Subsequent ratification is equivalent to prior authorization of the acts of an agent. No new consideration is necessary to support it. *Ib.*

PRINCIPAL'S ORDERS, NO EXCUSE FOR AGENT'S CONTEMPT. See Ex Parte Brown, 83.

KNOWLEDGE OF ATTORNEY AS AFFECTING HIS CLIENT. See Ford v. French, 250.

AVERMENT OF AGENCY IN INDICTMENT FOR EMBEZZLEMENT. See The State v. Dodson, 283.

AFFIDAVIT FOR APPEAL SWORN TO BY AGENT. See Melcher v. Scruggs 406.

PRINCIPAL AND SURETY.

1. CASHIER'S BOND: NON-LIABILITY OF SURETIES AFTER RE-ELECTION. One H. gave bond as cashier of a savings bank. The bond was silent as to the term of his office, and as to the period for which the sureties were to be liable thereon. A statute in force at the time made the term of the cashier and other officers of such banks "one year, and until their successors are duly elected and qualified." The statute prescribed no qualification for a cashier except that he should be a member of the board of directors. A by-law did, however, require him to give bond for the faithful performance of his duties. H. was re-elected cashier at two successive annual elections, and continued to discharge the duties of the office, but gave no new bond. During the third year of his cashiership he became defaulter. *Held*, that his sureties were not liable for the defalcation. The bond was not in force when it occurred. *The Savings Bank of Hannibal v. Hunt*, 597.

2. GUARDIAN'S BOND: SIGNATURE OF SURETY OBTAINED BY MISREPRESENTATION: FORGERY. A surety in a guardian's bond cannot avoid liability by showing that he was induced to sign by a representation that a name already on the bond as surety was the genuine signature of the party, when in point of fact it was a forgery, unless it be further shown that the officers of the probate court or the beneficiary had notice of the representation and its falsity. *The State ex rel. Hewitt v. Hewitt*, 603.

3. DURATION OF LIABILITY OF SURETIES ON AN OFFICIAL BOND. The sureties on the bond of an officer, who by law holds until his successor is elected and qualified, remain liable so long as he continues to hold the office, though that be beyond the term for which he was elected. *Long v. Seay*, 648.

PROBATE COURTS.

HAVE NO EQUITABLE JURISDICTION. See Butler v. Lawson, 227.

PROCESS.

1. SERVICE OF PETITION FOR REVIEW OF JUDGMENT BY DEFAULT ON PUBLICATION: ATTACHMENT. A petition for review of a judgment in attachment rendered by a justice of the peace upon publication of notice without service of summons or appearance of defendant to the action, must be served upon the plaintiff in person. Service upon his attorney will not be sufficient. R. S., §§ 457, 458. *Allen v. The Singer Manufacturing Company*, 326.

2. SERVICE BY LEAVING AT USUAL PLACE OF ABODE. A return which shows that the process was served by being left "at the Hardin House, * * the usual place of abode of the within named H. B. A., prior to the time he left this State, and became a non-resident," is not sufficient under a statute which authorizes service by leaving the writ at the usual place of abode. *Ib.*

3. WARRANT OF ARREST: FUGITIVE FROM JUSTICE: COMPLAINT FOR HIS ARREST, MUST SHOW WHAT. The complaint required by section 5706, Revised Statutes, to be filed before a warrant can be issued for the arrest of a person as a fugitive from justice from another state, must show that he has been guilty of some crime against the laws of that state: and this may be either by direct averment, or by stating facts which constitute a crime at common law. If there be no direct averment of a crime, and the facts stated do not constitute one at common law, (as, for example, the obtaining money under false pretenses,) the officer acquires no jurisdiction, and his warrant will be void. A statement that the act was committed feloniously and against the peace and dignity of the state where it occurred, will not be sufficient. *The State v. Swope*, 399.

4. SEARCH WARRANT, A PROTECTION TO OFFICER EXECUTING IT, WHEN. If a search warrant issued by a justice of the peace be regular upon its face, it will protect an officer executing it, though the affidavit upon which it is founded be not in compliance with the statute. *Melcher v. Scrugge*, 406.

5. MEASURE OF DAMAGES FOR EXECUTING UNLAWFUL SEARCH WARRANT. The damages for taking property under an unlawful search warrant, but without violence, are not to be limited by the value of the property. *Ib.*

CERTAINTY OF DESCRIPTION OT PAPERS REQUIRED IN A SUBPŒNA DUCES TECUM. See Ex Parte Brown, 83.

PROMISSORY NOTES.

1. THE instructions given by the circuit court upon the last trial of this case being in conformity with the ruling of this court when the case was here before, (63 Mo. 33,) the judgment is affirmed. *First National Bank of Trenton v. Gillilan*, 77.

2. NEGOTIABLE PAPER: INDORSER'S LIABILITY: PAROL EVIDENCE: AGENCY. An indorser of a negotiable promissory note cannot escape liability to a subsequent indorsee for value and without notice, by showing

that his indorsement was not made until after he had received the money for which the note was given, and that it was then made for the sole purpose of passing title to the indorsee and under a verbal agreement with the agent of the latter that the words "without recourse" should be written over the indorsement. *Lewis v. Dunlap*, 174.

3. JUSTICES' COURT: NO WRITTEN STATEMENT NECESSARY IN SUITS ON NOTES. In a suit upon a promissory note in a justice's court, no statement of the plaintiff's cause of action need be filed. The filing of the note is all that is required, even in cases where it does not appear from anything on the instrument how plaintiff's claim arises. Defendant may, if he chooses, before proceeding to trial, require plaintiff to make a verbal explanation of this. *The Mastin Bank v. Hammerslough*, 274.

4. RATIFICATION. If the maker of a note payable to A and indorsed by B as surety with the understanding that it is to be discounted by A, procures it to be discounted by C instead, B cannot on this ground, resist recovery by C or any one claiming under him, if, after the discount, with a full knowledge of all the facts, he either expressly or impliedly promised to pay the note. *Ib.*

5. NEGOTIABLE PAPER: FRAUD AS A DEFENSE: ORDER OF EVIDENCE. When the maker of a negotiable note proves that the instrument had its origin in fraud, or was fraudulently put in circulation, it is incumbent upon the holder, before he can recover, to prove that he received it *bona fide*, before maturity and for value.

The proper order of proof in such cases is for the plaintiff, after defendant has offered his evidence of fraud, to meet it by evidence of *bona fides* on his part. He is not required, however, to prove that he had no knowledge of the specific facts which impeach its original validity; but may make general proof that he received it before due, *bona fide* and for value. It will then be for defendant to prove that plaintiff had actual notice of the specific facts; and if he fails in this plaintiff must recover. *Johnson v. McMurry*, 278.

6. PROMISSORY NOTE: EFFECT OF A STRANGER TAKING UP A NOTE. If one not a party to nor liable upon a note takes it up with his own money, the transaction will be deemed a purchase, and not a payment, if such was the intention of the parties; and this is the rule, whatever may have been the mode adopted of accomplishing the result.

In this case one H., who had assumed to pay certain notes secured by a deed of trust on real estate, in order to prevent a foreclosure, procured a bank to take up the notes. The arrangement was that the bank should take the note of one B. with the real estate notes as collateral security. B. accordingly executed his note and sent it to the bank. The holder of the real estate notes also sent them to the bank accompanied by a draft on H. for the amount due upon them. The bank paid the amount, and took the notes; *Held*, that the transaction amounted to a purchase and not to a payment. *Swope v. Leffingwell*, 348.

7. PAROL PROMISE TO ACCEPT DRAFT. The payee of a draft cannot enforce against the drawee a parole promise to accept. R. S. 1879, § 537. *Flato v. Mulhall*, 522.

8. OBLIGATION PAYABLE ON DEMAND: DELAY IN DEMAND CONTEMPLATED BY THE CONTRACT: STATUTE OF LIMITATIONS. Where delay in making demand is contemplated by the express terms of an obligation payable on demand, there is no rule of law which requires that the demand be made within the statutory period for bringing an action. Thus, where an obligation for the payment of money one day after date, contained a condition that if the payee should demand payment during her natural life, it should be due and payable; but in case of her death before any or all of the debt should be paid, it should not be paid at all; *Held*, that a demand made by the payee more than ten years after the date of the paper was in time, and that an action brought immediately thereafter, was not barred by limitation. *Jameson v. Jameson*, 640.

PURCHASE.

PROMISSORY NOTE: EFFECT OF A STRANGER TAKING UP A NOTE. If one not a party to nor liable upon a note takes it up with his own money, the transaction will be deemed a purchase and not a payment, if such was the intention of the parties; and this is the rule, whatever may have been the mode adopted of accomplishing the result.

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QUESTIONS OF LAW AND FACT.

1. NEGLIGENCE, WHEN ONE, WHEN THE OTHER. Where the facts are disputed, the question of negligence is eminently one for the jury, under the instructions of the court; where they are clear and undisputed, it is undoubtedly the province of the court to declare the inference from these facts. *Bell v. The Hannibal & St. Joseph Railroad Company*, 50.

2. DEED, WHEN FRAUDULENT AND VOID AS MATTER OF LAW. The court cannot declare a conveyance to be fraudulent and void, unless it is fraudulent on its face. If the question of its validity depends upon extrinsic evidence, that evidence must be submitted to a jury. *Hewson v. Tootle*, 632.

RAILROADS.

1. SIGNALS AT PUBLIC CROSSINGS. The requirement of section 806, Revised Statutes, that the bell shall be rung or the whistle sounded at the approach of a railroad train to the crossing of a public highway, is for the benefit of persons on the highway at or approaching the crossing; failure to comply with the statute will furnish no ground

of complaint to a person injured on the track at a distance from the highway.

The statute does not require that these warnings shall be continued until the train has passed the crossing, but only until the engine has passed. *Bell v. The Hannibal & St. Joseph Railroad Company*, 50.

2. MAN ON THE TRACK: ENGINEER'S DUTY. An engineer in charge of a moving train has a right to assume that persons past the age of childhood will heed the usual alarm signals. If after giving such signals without effect, he uses such means as in his judgment are, in the emergency, most advisable to prevent collision with a person standing on the track, he is not chargeable with negligence, and the company cannot be held liable for the consequences of a collision, although he failed to use other means which were at hand, provided he is competent and experienced in his business.

In this instance the engineer applied the air brakes to the train, but did not attempt to reverse the engine. *Ib.*

3. NEGLIGENCE: CONTRIBUTORY NEGLIGENCE. The mere fact that a train was moving at a dangerous rate of speed, will not make the company liable for injuries to a person run over by the engine, if he was himself guilty of contributory negligence. *Ib.*

4. FREE RIDER ON FREIGHT TRAIN, TO BE REGARDED AS A PASSENGER, WHEN. It seems that a person riding on a freight train on which passengers are allowed to be carried, is to be regarded as a passenger, although he may have boarded the train without the knowledge or permission of the conductor and paid no fare, if the conductor, after becoming aware of his presence, permits him to remain. *Sherman v. The Hannibal & St. Joseph Railroad Company*, 62.

5. COMPANY LIABLE FOR TORTS OF SERVANT, WHEN. It is well settled that to make the master liable for the tortious act of his servant, the act causing injury must have been in the line of the servant's duty and within the scope of his employment. Upon this principle, where the conductor had exclusive control of a railroad train and of all persons on it, but a brakeman, nevertheless, without the knowledge of the conductor, assumed to direct a boy on the train to perform a certain service, and in the attempt to comply with the order the boy was injured; *Held*, that the railroad company was not liable. *Ib.*

6. ———: EFFECT OF PLAINTIFF'S YOUTH ON THE RULE OF LIABILITY. The youth of a person injured on a railroad train may excuse him from concurring negligence, but it cannot supply the place of negligence on the part of the company, or extend the liability of the company for tortious acts of its servants. *Ib.*

7. ———: INJURY TO PASSENGER ON FREIGHT CAR. If a passenger on a freight train is injured while simply riding on a freight car by reason of an accident to the train, the company will be liable if the rule prohibiting passengers from riding elsewhere than in the caboose is not conspicuously posted as required by law; but it is otherwise if the injury is the result of an attempt on his part to perform an unauthorized service for the company. *Ib.*

8. PLEDGE OF STOCK: PLEDGEE'S LIABILITY. Section 9, page 301, Wagner's Statutes, in relation to railroad companies, provides that "no person holding stock in any such company * * as collateral security, shall be personally subject to any liability as a stockholder of such company; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly." *Held*, that this section has no application to stock which has not been issued in the usual course of business, and, therefore, does not exempt from liability a person holding as collateral security unsubscribed stock issued to him by the company. NORTON, J., dissenting. *Griswold v. Seligman*, 110.

9. ACTION UNDER THE DOUBLE DAMAGE ACT: NEGLIGENCE. The owner of cattle killed at a public crossing of a railroad through the negligence of the company's servants, cannot recover in an action based on the 43rd section of the railroad law; an instruction submitting the question of negligence in case the jury should find that the killing occurred at such a crossing is, therefore, properly refused, even when asked by the defendant. *Sullivan v. The Hannibal & St. Joseph Railroad Company*, 195.

10. PLEADING NEGLIGENCE. Whatever is the real ground of complaint ought to be distinctly stated in the petition. Hence, in an action against a railroad company to recover for injuries alleged to have been sustained through the company's negligence, if the negligence consisted in having a defective sand-box on the engine and in keeping a defective frog in the track, the petition should not charge negligence in running the cars. *Edens v. The Hannibal & St. Joseph Railroad Company*, 212.

11. POWER OF COUNTY COURTS TO SUBSCRIBE STOCK. The act of March 23rd, 1861, (Sess. Acts, p. 60,) withdrew the power conferred on the county courts by the charter of the Laclede & Fort Scott Railroad Company, (Sess. Acts 1859-60 p. 434,) to subscribe to the stock of that company without first submitting the question to a vote of the people.

NAPTON AND HOUGH, JJ., dissented, holding that both upon a true construction of the statutes in question, and upon the principle *stare decisis*, the decision should have been otherwise. A similar point was otherwise decided in *Smith v. Clark Co.*, 54 Mo. 58. *The State ex rel. Barlow v. The Dallas County Court*, 329.

12. DOUBLE DAMAGES FOR KILLING OF CATTLE BY COMPANY NOT THE OWNER OF THE ROAD. A railroad company which operates its trains with its own servants and agents over a part of the road of another company, under an arrangement with that company, is liable under section 809, Revised Statutes 1879, in double damages for the killing, by its trains, of cattle which come on the track in consequence of the absence of fences. *Farley v. The St. Louis, Kansas City & Northern Railway Company*, 338.

13. PASSENGER ALIGHTING FROM MOVING TRAIN. Whether a railroad company which fails to bring its train to a full stop at a station, shall be held liable in damages for injuries sustained by a passenger in attempting to get off, depends upon whether under all the circumstances it was prudent for him to make the attempt. *Price v. The St. Louis, Kansas City & Northern Railway Company*, 414.

14. NEGLIGENCE: PLEADING: FAILURE OF PROOF: VARIANCE: RAILROAD. Where the plaintiff alleges a specific act of negligence as the ground of plaintiff's action, there can be no recovery for any other act. Thus where the specific negligence alleged was the failure of a railroad company to stop its train at plaintiff's station long enough for him to alight; *Held*, that he could not recover upon proof that the injuries for which he sued were sustained by reason of the company's failure to keep the platform lighted.

But, per NORTON, J., dissenting: In order to avail himself of this principle, the defendant must pursue one of three courses at the trial: 1st, Object to the introduction of evidence when offered; or, 2nd, Ask an instruction excluding it from the consideration of the jury; or 3rd, File an affidavit stating that he is surprised by its introduction, and wherein. *Ib.*

15. DANGEROUS CROSSING: EMPLOYMENT OF FLAGMAN: NEGLIGENCE. Railroad companies are not bound to station flagmen at the crossing of public highways, no matter how dangerous. If the bell is rung, or the whistle sounded, as the train approaches the crossing, in compliance with section 806, Revised Statutes, a company fulfills its whole duty, except, perhaps, in a case where the crossing is of such a character that the employment of a flagman is one of the common and usual means of warning adopted by prudent railroad companies. In such case the omission to employ one might be negligence. *Welsch v. The Hannibal & St. Joseph Railroad Company*, 451.

16. DOUBLE DAMAGES FOR INJURY TO STOCK. A railroad company is not liable in double damages, under the 43rd section of the railroad law, (R. S., § 809,) for an injury to stock which does not result from direct or actual collision with the engine or cars, as for instance, where the animal is killed by the servants of the company in an attempt to extricate it from a trestle into which it has fallen. *Seibert v. The Missouri, Kansas & Texas Railway Company*, 565.

17. EVIDENCE IN ACTION FOR KILLING STOCK. In an action against a railroad company for killing a cow, there was evidence to show that the cow was found beside the defendant's track, torn and mutilated, and that there was blood and cow's hair on the track near by. *Held*, sufficient to warrant the court in submitting to the jury the question how the animal came to her death. *Blewett v. The Wyandotte, Kansas City & Northwestern Railway Company*, 583.

18. DOUBLE DAMAGE ACT CONSTRUED. It is not necessary to recovery, in an action for the killing of stock founded on the 43rd section of the railroad law, (R. S., § 809,) to show that three months have elapsed since the completion of the road at the place where the killing occurred. *Ib.*

19. MECHANIC'S LIEN FOR WORK DONE, ETC., OUTSIDE OF THE STATE. There is nothing in the act in relation to mechanic's liens on railroads, (R. S., § 3200,) restricting the right to a lien to those who perform work or furnish materials within the limits of this State. If part of a railroad lies within and part without this State, a lien may be enforced against that part within the State, though the work was done or materials furnished on the part without. *The St. Louis Bridge & Construction Company v. The Memphis, Carthage & Northwestern Railroad Company*, 664.

20. MECHANIC'S LIEN: NEGLECT OF DUTY BY CLERK OF THE COURT. Failure of the clerk of the circuit court to forward to the Secretary of State a copy of an account filed for a mechanic's lien against a railroad, as required by section 3203, Revised Statutes, will not defeat the lien. *Ib.*

NEGLIGENCE IN CROSSING RAILROAD TRACK. See Purl v. The St. Louis, Kansas City & Northern Railway Company, 168.

FLOODING LAND BY CONSTRUCTION OF RAILROAD. See Munkres v. The Kansas City, St. Joseph & Council Bluffs Railroad Company, 514.

RAPE.

1. AN indictment for rape, held sufficient. *The State v. Hatfield*, 518.

2. EVIDENCE: PRACTICE. Upon trial of an indictment for rape, the prosecutrix stated the substance of the vulgar language used by defendant in making his assault upon her, and another witness stated the exact words. The court refused to compel the prosecutrix to state the exact words. *Held*, no error. *Ib.*

RATIFICATION.

1. ACTS OF AGENT. Subsequent ratification is equivalent to prior authorization of the acts of an agent. No new consideration is necessary to support it. *Ferris v. Thaw*, 446.

2. APPOINTMENT OF COUNTY AGENT: RATIFICATION OF VERBAL APPOINTMENT. Though the law may require the appointment of an agent for the transaction of county business to be made by order of record in the county court, yet a contract made by an agent acting under a mere verbal appointment, if subsequently ratified and approved by an order of record, will notwithstanding the irregularity, be as binding upon the county as if the appointment had been properly made in the first instance. *Walker x. Linn County*, 650.

REASONABLE DOUBT.

AN instruction defined a reasonable doubt to be "a real, substantial and well founded doubt, and not a mere possibility that the defendant is innocent;" and added that "the testimony of one witness, if true, is sufficient to warrant a conviction." *Held*, no error. *The State v. Gann*, 374.

RECEIVERS.

SUIT BY RECEIVER OF AN INSURANCE COMPANY IN HIS OWN NAME. Section 32 of the insurance law, (Wag. Stat., p. 774,) confers upon the courts, in proceedings instituted against an insurance company under that law by the Superintendent of the Insurance De-

partment, power to appoint agents or receivers to take possession of the property of the company and to make such orders and decrees as may be needful to suspend, restrain or prohibit the further continuance of the business of the company, or for the dissolution of the company and the winding up of its affairs. *Held*, that the general power of making all needful orders for winding up the affairs of the company thus conferred included the power to make an order authorizing and directing a receiver appointed in such a proceeding to bring suit in his own name for the assets of the company; and that a suit so brought under such an order could be maintained. *Gill v. Balis*, 424.

RECEIVER'S ALLOWANCE FOR SERVICES. See Morse v. The Hannibal & St. Joseph Railroad Company, 585.

RECOGNIZANCE.

A recognizance given by one in custody under an illegal warrant, is involuntary, and cannot be enforced against him or his sureties. *The State v. Swope*, 399.

RECORD OF DEEDS.

1. DEED: NOTICE OF TITLE: RAILROAD. A railroad company, under an unrecorded license from the owner, surveyed, located and partly graded its road across a tract of land, and then suspended work. The owner afterward executed a mortgage, which covered the strip appropriated by the company, to a person who had no actual notice of the company's rights or of the work done. *Held*, that he was not bound by the license. *Masterson v. The West End Narrow Gauge Railroad Company*, 342.

2. INJUNCTION TO RESTRAIN SALE AS A CLOUD ON PLAINTIFF'S TITLE. Where the title to real estate is vested in one as trustee for another, but the trust is not a matter of record, but depends upon facts resting largely in parol, injunction will lie on behalf of the beneficiary to restrain a sale of the property under an execution against the trustee as his individual estate. *South Presbyterian Church v. Hintze*, 363.

REFEREE.

See Johnson v. Long, 210.

REPLEVIN.

1. CROPS. Corn in the stalk is the subject of replevin; and this without regard to whether it is growing, or, having matured, has ceased to derive any nourishment from the soil. *Garth v. Caldwell*, 622.

2. ——: PLEADING. Even if it was necessary that a petition in replevin for corn in the stalk should show that the corn had matured, yet a failure to do this could not be taken advantage of after verdict. *Ib.*

3. VERDICT. Where the plaintiff in replevin has the property in possession, a general verdict in his favor without an assessment of damages is not an error of which defendant can complain. *Ib.*

4. JEOFAILS. Omission to state directly in a petition in replevin that the property in controversy is in the possession of defendant, will be deemed cured, at least after verdict, if there is an averment that the defendant wrongfully detains it. So, also, if the answer confesses the fact, though only by implication. *Ib.*

ROADS.

AN indictment for obstructing a highway; *Held*, sufficient. *The State v. Risley*, 609.

ROBBERY.

1. CONSPIRACY TO ROB: ROBBERY OF WRONG MAN BY MISTAKE. If parties enter into a conspiracy to rob one person, and, by mistake, some of the conspirators rob another, or assault him with intent to rob under the belief that he is the person intended, and one of the conspirators who was not present being subsequently advised of the facts, assents to them and participates or acquiesces in the result, he becomes equally liable with the others. *The State v. Greenwade*, 298.

2. CRIMINAL LAW: ATTEMPT TO STEAL: ATTEMPT TO ROB. The defendants having been convicted of an attempt to commit larceny; *Held*, that the judgment must be reversed, the evidence showing an attempt to commit robbery rather than larceny. *The State v. Craft*, 456.

ST. LOUIS.

1. ST. LOUIS SCHEME AND CHARTER: SPECIAL TAX BILLS. A special tax bill issued under an ordinance approved by the acting mayor and city council of St. Louis, on December 29th, 1876, after the city council was abolished and the new charter adopted, but before the fact was known, is not necessarily void. *Adams v. Lindell*, 198.

2. ST. LOUIS CITY COLLECTOR'S COMMISSIONS. An ordinance of the city of St. Louis provided that the city collector should receive for his services two and one-half per cent on all moneys collected, until the amount collected should reach $300,000; three per cent on an additional $100,000, and five per cent on all other sums collected in each fiscal year, over said amounts. There having been two successive incumbents of the office of city collector during one fiscal year; *Held*, that in determining the rate at which the commissions of the latter incumbent were to be computed, the collections made by his predecessor should be taken into account. *Lemoine v. The City of St. Louis*, 404.

STREET RAILROADS IN ST. LOUIS. See St. Louis Railroad Company v. South St. Louis Railroad Company, 67.

ST. LOUIS COUNTY.

AUDITOR OF ST. LOUIS COUNTY: SCHOOLS. It was no part of the duty of the auditor of St. Louis county to collect the county and township school moneys. Acts 1874, pp. 162, 167, §§ 69, 86.

The sureties in his official bond, therefore, could not be held responsible for school moneys collected by him and not accounted for. *The State to the use of St. Louis County v. Bonner*, 387.

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2. ORGANIZATION OF CITIES INTO SCHOOL DISTRICTS: SCHOOL TAXES. The fact that the citizens of an incorporated city had once voted down a proposition to organize their city into a separate school district under chapter 47, General Statutes 1865, page 274, was no legal obstacle to its subsequent organization in pursuance of a vote taken at a second election; but when so organized the district had no power to levy school taxes on lands not lying within the corporate limits of the city and not attached to it for school puposes. *Ewing v. The Board of Education of Jefferson City*, 436.

3. COUNTY TREASURER: HIS BOND AS CUSTODIAN OF SCHOOL MONEYS. The separate bond required by section 42, page 1251, Wagner's Statutes, to be given by the county treasurer as custodian of school moneys, need not specify those moneys. The condition prescribed by section 42 is, that the treasurer "will faithfully disburse and pay over according to law all such funds and moneys as may from time to time come into his hands as such treasurer." The sureties in a bond so conditioned will be liable for any school moneys received and not accounted for by the treasurer. *The State ex rel. Brawford v. Cook*, 496.

4. ———: TOWNSHIP SCHOOL MONEYS. In an action against a county treasurer on his school bond to recover moneys not accounted for, he is not entitled to credit for sums paid, on warrants of the county clerk, to the clerk of any township in excess of the amount received by him for that township. *Ib.*

SEARCH WARRANT.

1. A PROTECTION TO OFFICER EXECUTING IT, WHEN. If a search warrant issued by a justice of the peace be regular upon its face, it will protect an officer executing it, though the affidavit upon which it is founded be not in compliance with the statute. *Melcher v Scruggs*, 406.

2. MEASURE OF DAMAGES FOR EXECUTING UNLAWFUL SEARCH WARRANT.

The damages for taking property under an unlawful search warrant, but without violence, are not to be limited by the value of the property. *Ib.*

SEDUCTION.

ACTION BY FEMALE SERVANT AGAINST MASTER FOR PERSUADING HER TO CONSENT TO ILLICIT INTERCOURSE. A master persuaded his female servant to have sexual intercourse with his minor son, to whom she was at the time engaged to be married. The son afterward refused to fulfill his engagement. *Held*, that these facts afforded the servant no ground of action against the master. *Jordan v. Hovey*, 574.

SHERIFF.

1. LIABILITY FOR ERRONEOUS INFORMATION FURNISHED BY DEPUTY. If the attorney for the plaintiff in an execution is misinformed by the sheriff's deputy as to the place of sale, and for that reason fails to attend the sale, and no one is present to protect the plaintiff's interest, in consequence of which property sufficient to pay the debt is sacrificed and plaintiff gets nothing, the sheriff will be liable to the plaintiff for the loss. *The State ex rel. The Central Type Foundry v. Moore*, 285.

2. MUST POSTPONE SALE TO AVOID SACRIFICING PROPERTY. If a sheriff sees that property which he is offering at execution sale is about to be sacrificed, and knows that it was the intention of plaintiff's attorney to be present and protect plaintiff's interest by bidding, but sees that the attorney is absent, and knows that his absence is owing to erroneous information furnished by his own deputy, he should not permit the sale to go on, but should postpone it, and if he fails to do so and the property is sacrificed, he will be liable. *Ib.*

SHERIFF'S DEED.

1. A sheriff's deed only relates back to the day of sale as to the defendant in the execution under which the sale is made, his privies and strangers purchasing with notice. *Ford v. French*, 250.

2. IN ATTACHMENT CASES. If the affidavit for an attachment is not signed by the affiant, the court acquires no jurisdiction, and a sheriff's deed based upon a judgment in the case is a nullity. SHERWOOD, C. J., and NORTON, J., dissent. *Hargadine v. Van Horn*, 370.

SPECIAL JUDGE.

See The State v. Dodson, 283; The State v. Greenwade, 298.

SPECIAL TAX BILLS.

THEIR CONSTITUTIONALITY. See Adams v. Lindell, 198.

SPECIFIC PERFORMANCE.

1. AGREEMENT BETWEEN FATHER AND SON FOR CONVEYANCE IN CONSIDERATION OF SERVICES AND SUPPORT: ABORTIVE WILL. A father and son agreed together that if the son would remain with and support the father and his wife (the son's step-mother) during their lives and work the farm under the father's directions, the farm should at his death belong to the son. The son, on his part, carried out the agreement during a period of seventeen years and until both the father and step-mother were dead. The father, for the purpose of carrying out the agreement on his part, made and delivered to the son a will devising the farm to him. The will made no mention of the testator's other children, and for that reason was void. *Held*, that the son was entitled to have the agreement enforced against the other children. The failure of the attempt to carry it out by will could not be allowed to prejudice his rights. *Hiatt v. Williams*, 214.

2. SPECIFIC PERFORMANCE: EQUITY: WILL. In an action to compel specific performance of a contract to convey land, it appeared that the land was part of an estate held by the defendant under a will, by the terms of which defendant was invested with absolute power of disposal over it, but was directed to divide the entire estate equally among the testator's children, of whom plaintiff was one. The defense was that plaintiff had already received more than her share. *Held*, that evidence in support of this allegation should have been received, and if it was established, the decree prayed should only be granted upon condition, either that plaintiff refund the excess received, or that the excess remain a charge and lien on the land. *Smith v. Estes*, 310.

STATUTES.

1. STATUTES DERIVED FROM OTHER STATES. Where a statute of this State is derived from another state, a decision of the supreme court of that state construing it, rendered after its adoption here, does not carry with it that authoritative force that it would have had if it had been rendered before the adoption. *Griswold v. Seligman*, 110.

2. AFTER-ENACTED STATUTE. The prohibition contained in section 2116, Revised Statutes, against taxing the State with the costs of witnesses unnecessarily summoned and not examined, applies to a case where such costs accrued but were not taxed prior to the enactment of that section. *The State ex rel. Dalton v. Hill*, 512.

3. CONFLICT OF LAWS: STATUTE LAW OF SISTER STATES: COMMON LAW. This court cannot take judicial notice of the statutes of another state; neither can it presume that the common law prevails in a state, such as Texas, which was never subject to the laws of England. Where, therefore, a contract comes in question, the validity of which is properly determinable by the law of such a state, if no

evidence is offered to show what the law of that state is, resort must be had to the law of this state to determine the question. *Flato v. Mulhall.* 522.

STATUTES CONSTRUED.

REVISED STATUTES OF 1879.

Section 457, See Process, 1.
Section 458, See Process, 1.
Section 537, See Promissory Notes, 7.
Section 806, See Railroads, 1.
Section 809, See Railroads, 12, 16, 18.
Section 972, See Insurance, 2.
Section 973, See Insurance, 2.
Section 974, See Insurance, 2.
Section 1804, See Constitutional Law, 1.
Section 1877, See Courts, 4.
Section 1881, See Courts, 4.
Section 1908, See Practice, Criminal, 1.
Section 2116, See Costs, 2.
Section 3519, See Practice, 10.
Section 3568, See Practice, 9.
Section 4010, See Witnesses, 1.

WAGNER'S STATUTES OF 1872.

Page 88, § 33, See Administration, 15.
Page 289, § 1, See Corporations, 14.
Page 301, § 9, See Railroads, 8
Page 458, § 35, See Embezzlement, 1.
Page 539, § 5, See Administration, 15.
Page 595, § 36, See Deed, 7.
Page 719, § 4, See Druggists.
Page 719, § 6, See Druggists.
Page 720, § 10, See Druggists.
Page 774, § 32, See Receivers, 1.
Page 908, § 3, See Damages, 10.
Page 938, § 3, See Municipal Corporation, 4.
Page 951, § 25, See Mills and Mill Dams, 2, 3.
Page 1033, § 1, See Variance, 1.
Page 1251, § 42, See Schools, 3.

GENERAL STATUTES OF 1865.

Page 274, See Schools, 2.

REVISED STATUTES OF 1835.

Page 405, See Mills and Mill Dams, 1.

ACTS OF 1877.

Page 27, § 25, See Costs, 1,
Page 33, See Deed, 9.
Page 162, § 69, See Schools, 1.
Page 167, § 86, See Schools, 1.

ACTS OF 1873.

Page 100, § 2, See Township Organization.

ACTS OF 1861.

Page 60, See Railroads, 11.

ACTS OF 1859-60.

Page 434, See Railroads, 11.

STREET RAILROADS.

IN ST. LOUIS: PARALLEL LINES. Section 3 of the act of January 16th, 1860, (Acts 1860, p. 52,) whereby it was enacted that no street railway should be constructed in the city of St. Louis nearer to a parallel railway than the third parallel street, was not repealed by the act of February 15th, 1864, (Acts 1864, p. 446,) nor by the act of March 19th, 1866, (Acts 1865-6, p. 283, art. 4, § 1, clause 51,) nor by the act of March 13th, 1867, (Acts 1867, p. 62, art. 4, § 1,) nor by the act of March 4th, 1870, (Acts 180, p. 463, art. 3, § 1, cl. 5, 9, 16, and art. 12, § 8,) nor by article 10, section 1 of the present charter of the city of St. Louis, (R. S. 1879, p. 1616). Neither has the municipal assembly of said city the power to repeal said section 3. *St Louis Railroad Company v. South St. Louis Railroad Company*, 67.

SUBPŒNA DUCES TECUM.

CERTAINTY OF DESCRIPTION OF PAPERS REQUIRED IN SUBPŒNA DUCES TECUM. A subpœna *duces tecum* to compel the production of telegraphic dispatches should give a reasonably accurate description of the papers wanted either by date, title, substance or the subject to which they relate. The following description is not sufficiently certain: Dispatches between Dr. J. C. Nidelet and A. B. Wakefield, and William Ladd and J. C. Nidelet, and William Ladd and Dr.

Nidelet, between Warren McChesney and A. B. Wakefield, between Warren McChesney and J. C. Nidelet, between the latter and John S. Phelps, between A. B. Wakefield and John S. Phelps, between the latter and William Ladd, and between Geo. W. Anderson and A. B. Wakefield, sent or received by or between any or all of said parties within fifteen months last past. *Ex Parte Brown*, 83.

TAX.

1. CAPE GIRARDEAU CITY CHARTER: TAXATION: MERCHANT'S LICENSE. The charter of the city of Cape Girardeau authorized the city to levy taxes for railroad purposes upon "all property in the city made taxable by the general law of the State for State purposes." The 3rd section of the General Statute in relation to merchants' licenses, (Wag. Stat., p. 938,) required that all merchants should pay an *ad valorem* tax, equal to that levied upon real estate, on the highest amount of goods in their possession, whether owned by them or consigned to them for sale, at any time during a certain named period of the year. *Held*, that this statute imposed an indirect tax on property, and not a mere arbitrary charge for the exercise of a privilege; and that the foregoing provision of the charter authorized the city to impose a similar tax, the amount of which should be ascertained in the same way. *The City of Cape Girardeau v. Riley*, 220.

2. CASE ADJUDGED: TAXATION OF ATTORNEY'S FEES AS COSTS. A city ordinance provided that delinquent city taxes should bear interest at the rate of two per cent per month until paid, and if not paid by a day named, that fifty per cent should be added as a penalty, and if suit should be brought and judgment should be recovered by the city, that there should be taxed as costs against the defendant a fee of $25 for the city's attorney, and in case of appeal to the Supreme Court, a further fee of $50; and these fees were to be so taxed whether the defendant's defense was *bona fide* or frivolous. It appearing in the present case that the defense was *bona fide*, *Held*, that the provision of the ordinance in relation to attorney's fees was unreasonable and unnecessary to carrying out the charter, and the fees should not be allowed. *Ib.*

3. INJUNCTION AGAINST ILLEGAL TAXATION: PRACTICE. The remedy by injunction in the name of the State does not lie against a board of education to prevent the collection of a tax levied by the board, the validity of which is disputed on the ground that the board has no corporate existence, nor to prevent the collection of one which has been extended on the tax books and placed in the hands of the collector. The remedy in the latter case is injunction in the name of the taxpayer against the collector. *Ewing v. The Board of Education of Jefferson City*, 436.

4. SCHOOLS: ORGANIZATION OF CITIES INTO SCHOOL DISTRICTS: SCHOOL TAXES. The fact that the citizens of an incorporated city had once voted down a proposition to organize their city into a separate school district under chapter 47, General Statutes 1865, page 274, was no legal obstacle to its subsequent organization in pursuance of a vote taken at a second election; but when so organized the district had no power to levy school taxes on lands not lying within the corporate limits of the city and not attached to it for school purposes. *Ib.*

TELEGRAPHIC MESSAGES.

1. COMPULSORY PRODUCTION OF TELEGRAPHIC MESSAGES IN COURT: LIABILITY OF COMPANY'S AGENT TO PUNISHMENT FOR REFUSAL. Telegraphic messages in the possession of the officers of the company, are not privileged communications. No act of Congress puts them on the same footing with the mails; and no statute of the State or principle of law gives them any different standing from that occupied by any communication made by one through another to a third party, with respect to the liability of the confident to be called as a witness to produce it or testify to it. The agent of a telegraph company may, therefore, be compelled by proper process to produce such messages before the grand jury; and no rule of the company can excuse him from liability to punishment for refusal so to do. *Ex Parte Brown*, 83.

2. ———: CERTAINTY OF DESCRIPTION OF PAPERS REQUIRED IN SUBPŒNA DUCES TECUM. A subpœna *duces tecum* to compel the production of telegraphic dispatches should give a reasonably accurate description of the papers wanted either by date, title, substance or the subject to which they relate. The following description is not sufficiently certain: Dispatches between Dr. J. C. Nidelet and A. B. Wakefield, and William Ladd and J C. Nidelet, and William Ladd and Dr. Nidelet, between Warren McChesney and A. B. Wakefield, between Warren McChesney and J. C. Nidelet, between the latter and John S. Phelps, between A. B. Wakefield and John S. Phelps, between the latter and William Ladd, and between Geo. W. Anderson and A. B. Wakefield, sent or received by or between any or all of said parties within fifteen months last past. *Ib.*

TENDER.

CONTRACT OF PERSON OF UNSOUND MIND. An exchange of property made by a person of mind so unsound, that the want of mental capacity is apparent to any one of ordinary prudence and observation conversing with him, is of no validity. A guardian subsequently appointed may recover the property of the insane person without tendering back that received by him in the exchange. *Halley v. Troester*, 73.

THREATS.

EVIDENCE OF. See The State v. Stark, 37.

TORTS.

RULE AS TO MASTER'S LIABILITY FOR SERVANT'S TORTS. See Sherman v. The Hannibal & St. Joseph Railroad Company, 62.

TOWNSHIP BONDS.

1. CONFLICTING DECISIONS OF STATE AND FEDERAL COURTS: COMPROMISE OF BONDS. Notwithstanding this court holds the act of March 23rd,

1868, authorizing the issue of township bonds, unconstitutional, and bonds issued thereunder, void, yet since the courts of the United States hold the contrary, such bonds cannot be deemed such absolute nullities as not to be the subject of compromise. *The State ex rel. Stamper v. Holladay*, 499.

2. POWER TO COMPROMISE UNDER ACT OF 1877. The act of April 12th, 1877, (Sess. Acts, p. 197,) providing for the compromise, purchase or redemption of municipal indebtedness, while it could not be construed to authorize the compromise of bonds issued without any color of authority, and manifestly creating no debt or obligation which the municipality is bound to pay either in law or equity, will not, on the other hand, be limited to unquestionable claims, but will be construed to include bonds in respect to whose validity courts of co-ordinate jurisdiction differ, such as the township bonds issued under the act of 1868. *Ib.*

TOWNSHIP ORGANIZATION.

1. DUTY OF TOWNSHIP TRUSTEE. Under the township organization law, (Acts 1873, p. 100, § 2,) the township trustee was but the ministerial officer of the township board of directors, and as such, he was bound to pay any warrant legally drawn by the board, if he had funds in his hands for the purpose. *The State ex rel. Jordon v. Haynes*, 377.

2. POWER OF TOWNSHIP TO BUILD PUBLIC HALL. The township had power under that law to purchase a site and erect upon it a hall in which to transact its corporate business. *Ib.*

3. THIS POWER VESTED IN THE BOARD. The power of selecting a site and erecting a township hall thereon, was vested in the board of directors, and not in the citizens of the township assembled *en masse*. *Ib.*

TRESPASS.

1. TRESPASS BY MINING: LEASE. It is no defense to an action for mining and taking coal from under plaintiff's land, that the defendant has made payment for the coal to a person who had a mining lease upon the land, but had never entered nor done any work under the lease. *Austin v. The Huntsville Coal & Mining Company*, 535.

2. OUTSTANDING LEASE, WHEN NO DEFENSE IN TRESPASS. An action will lie for an injury to the possession of land, notwithstanding there is outstanding an unexpired lease granted by the plaintiff, in the action, provided there is no one in possession under the lease. *Ib.*

3. ———. Under the same circumstances an action will lie for injury to the freehold caused by mining. *Ib.*

4. MEASURE OF DAMAGES: TORT. In an action for wrongfully mining and taking coal, if it appears that the defendant's act was not willful or grossly negligent, the true measure of damages for the coal

taken is its value at the mouth of the shaft, less the cost of severing it from the freehold and delivering it at the mouth. *Ib.*

TRESPASS BY THE POLICE. See The State *ex rel.* The Attorney General v. France, 41.

TRUSTS AND TRUSTEES.

1. PARTIES: TRUSTS: PRACTICE: ADMINISTRATION. Where a misappropriated trust fund consists in part of personal property, both the administrator and the heirs of a deceased beneficiary are necessary and proper parties to an action to recover it. *Butler v. Lawson*, 227.

2. ——: ——: ——. Where a misappropriated trust fund consists in part of real and in part of personal property, the heirs and the legal representatives of all the beneficiaries may sue jointly to recover the whole in one action. *Ib.*

3. STATUTE OF LIMITATIONS: TRUSTS. An action against a delinquent trustee who has left the state of his residence, and come into this State, and here studiously concealed his whereabouts, will not be barred by the lapse of a great length of time, (in this case, forty years,) provided it is commenced within the period limited by statute after his whereabouts became known to the beneficiaries. *Ib.*

4. ——: TRUSTEE'S POSSESSION NOT ADVERSE, UNTIL, ETC. Where a trustee purchases property with trust funds, though in his own name, his possession will be deemed the possession of the beneficiaries until he does some unequivocal act denying their right; till then the statute of limitations does not begin to run against them. *Ib.*

5. DEVISE TO TRUSTEE FOR SUPPORT OF DEVISOR'S BROTHER: DISCRETION IN TRUSTEE AS TO AMOUNT OF ALLOWANCE: TRUSTEE'S LIEN FOR ADVANCES. A testatrix devised her entire estate, consisting of realty, to a trustee with full power of sale. After directing what use the trustee should make of one-third of the estate, the will declared: "*Fourth*, Out of the proceeds, interest, rents, income or profits of the balance of my estate, my trustee shall, from time to time, pay over to my brother, J. W. R., such sum or sums of money as my brother may need for his support. Not knowing how much may be necessary for that purpose, I leave the amount entirely to the discretion of my said trustee, with the understanding that the aggregate shall not exceed the remaining two-thirds of the proceeds of my said estate, except in case the preceding clause of this, my last will and testament in favor of the children of my deceased sister, should become void: for in that case my said trustee may also employ that one-third for the support of my brother, should my said trustee deem it proper and expedient to do so." *Held*, that the trustee was not limited to the income for the support of J. W. R., but might if he saw fit, use the *corpus* of two-thirds of the estate; and that his discretion as to the amount, within the limit named, was absolute, and not to be controlled by any court. *Held*, also, that the trustee was entitled to a lien upon J. W. R.'s two-thirds interest for such sums as he advanced to J. W. R. before the property of the estate could be sold. *Haydel v. Hurck*, 253.

6. MARRIED WOMAN'S TRUST ESTATE: WAIVER OF IRREGULARITY IN APPEARANCE. If a married woman's trustee receives the proceeds of land sold under a decree of court, and there is no evidence that he has failed to comply with his trust, neither she nor her heirs can avoid the sale on the ground that in the proceeding, which resulted in the decree, she appeared by attorney and not by next friend. *Mercier v. The West Kansas City Land Company*, 473.

VARIANCE.

IF there be a discrepancy between a note offered in evidence and the one declared on in the petition, and defendants are misled thereby, they should take advantage of the variance by affidavit as provided by Wagner's Statutes, page 1033, § 1. *Ferris v. Thaw*, 446.

VENUE.

OF INDICTMENT. See Ex Parte Slater, 102.

VERDICT.

INTERPLEA IN ATTACHMENT: VERDICT. Upon the trial of an interplea in attachment, the verdict must be responsive to the issue presented, viz: whether the property attached was the property of the interpleader. A mere money verdict in favor of the interpleader will not do, even where the property has been sold and the proceeds are in the hands of the sheriff. *Hewson v. Tootle*, 632.

WAIVER.

CONTRACT: ACCEPTANCE, NO WAIVER WITHOUT KNOWLEDGE. Mere acceptance of, and payment for a bridge built under contract, does not waive any defect in the work, of which the acceptor is at the time ignorant. There must be both knowledge and acquiescence to constitute waiver; and it devolves upon the contractor to show such knowledge. *Johnson County v. Lowe*, 637.

OF IRREGULARITY IN APPEARANCE. See Mercier v. The West Kansas City Land Company, 473.

WATER AND WATER COURSES.

RAILROAD FLOODING ADJOINING LANDS BY CONSTRUCTION OF ITS ROAD: SURFACE WATER: WATER COURSE. A railroad company whose road was built upon a right of way granted to the company by the proprietor for that purpose, so constructed its road-bed and ditches as to collect and discharge water upon adjacent lands of the latter. In an action against the company to recover for the damages thus sustained, the evidence was conflicting as to whether the water was that of a running stream or natural water course, or whether it was simply surface water. The trial court, after instructing the jury as

to what constitutes surface water and what a stream or water course, further instructed them in substance, as follows: 1. That if the water was surface water the company was not liable, provided its road-bed and ditches were constructed with reasonable care and skill with reference to the use of the same for railroad purposes. The company was not bound to make ditches to protect plaintiff's land from injury from surface water. 2. But if the water was that of a stream or natural water course, and it was diverted from its natural channel, the company was liable; provided, however, that plaintiff could not recover for damages which he might have averted at comparatively small cost. The company was bound to make sufficient ditches and passages to conduct the water away and prevent it from injuring plaintiff; but if it did not do so, it was the duty of plaintiff to use all reasonable means to avert and avoid injury by the construction of ditches and levees himself within a reasonable time, if the same could be done at a reasonable amount of labor and expense. On appeal by the company from a verdict and judgment for plaintiff; *Held*, that the company had no right to complain of these instructions. But see *Shane v. K. C., St. Joseph & Council Bluffs R. R. Co.*, 71 Mo. 237; *McCormick v. same*, 70 Mo. 359. *Munkres v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 514.

WILLS.

1. AGREEMENT BETWEEN FATHER AND SON FOR CONVEYANCE IN CONSIDERATION OF SERVICES AND SUPPORT: SPECIFIC PERFORMANCE. A father and son agreed together that if the son would remain with and support the father and his wife (the son's step-mother) during their lives and work the farm under the father's directions, the farm should at his death belong to the son. The son, on his part, carried out the agreement during a period of seventeen years and until both the father and step-mother were dead. The father, for the purpose of carrying out the agreement on his part, made and delivered to the son a will devising the farm to him. The will made no mention of the testator's other children, and for that reason was void. *Held*, that the son was entitled to have the agreement enforced against the other children. The failure of the attempt to carry it out by will could not be allowed to prejudice his rights. *Hiatt v. Williams*, 214.

2. DEVISE TO TRUSTEE FOR SUPPORT OF DEVISOR'S BROTHER: DISCRETION IN TRUSTEE AS TO AMOUNT OF ALLOWANCE: TRUSTEE'S LIEN FOR ADVANCES. A testatrix devised her entire estate, consisting of realty, to a trustee with full power of sale. After directing what use the trustee should make of one-third of the estate, the will declared: "*Fourth*, Out of the proceeds, interest, rents, income or profits of the balance of my estate, my trustee shall, from time to time, pay over to my brother, J. W. R., such sum or sums of money as my brother may need for his support. Not knowing how much may be necessary for that purpose, I leave the amount entirely to the discretion of my said trustee, with the understanding that the aggregate shall not exceed the remaining two-thirds of the proceeds of my said estate, except in case the preceding clause of this, my last will and testament in favor of the children of my deceased sister, should become void; for in that case my said trustee may also em-

ploy the one-third for the support of my brother, should my said trustee deem it proper and expedient to do so." *Held*, that the trustee was not limited to the income for the support of J W. R, but might if he saw fit, use the *corpus* of two-thirds of the estate; and that his discretion as to the amount, within the limit named, was absolute, and not to be controlled by any court. *Held*, also, that the trustee was entitled to a lien upon J. W. R.'s two-thirds interest for such sums as he advanced to J. W R. before the property of the estate could be sold. *Haydel v. Hurck*, 253.

3. PROBATE OF WILL. Probate of a will can only be granted by the court. Proof may be taken by the clerk or a judge of the court, but subject to confirmation or rejection by the court. Unless there is a confirmation, appropriately evidenced by an order to that effect, the will is not probated. *Smith v. Estes*, 310.

4. SPECIFIC PERFORMANCE: EQUITY: WILL. In an action to compel specific performance of a contract to convey land, it appeared that the land was part of an estate held by the defendant under will, by the terms of which defendant was invested with absolute power of disposal over it, but was directed to divide the entire estate equally among the testator's children, of whom plaintiff was one. The defense was that plaintiff had already received more than her share. *Held*, that evidence in support of this allegation should have been received, and if it was established, the decree prayed should only be granted upon condition, either that plaintiff refund the excess received, or that the excess remain a charge and lien on the land. *Ib.*

5. WILL: PERSONAL CHARGE ON DEVISEE FOR LIFE: DEVISE OF "WHAT REMAINS" AFTER LIFE ESTATE. A testator by his will appointed his wife executrix of his estate, willed that all his just debts be paid, and that his wife raise his children as she might think proper, and bequeathed to her "all my (his) estate, both real and personal, during her natural life or widowhood, and what then remains to be equally divided among my (his) children." *Held*, that the clauses relating to the payment of debts and the rearing of the children imposed no personal charge upon the wife, so as to afford an opportunity for the application of the rule that, when a will imposes a charge on the person of a devisee, it creates a fee; neither do the words "what then remains" imply a power of disposition of the real estate, annexed to the life estate devised to the wife; they are to be limited to the personalty. The wife's interest in the realty, therefore, was a simple life estate. *Foote v. Sanders*, 616.

WITNESSES.

1. HEIRS OF PARTY TO DEED AS WITNESSES, OTHER PARTY BEING DEAD. The children of the grantee in a deed, who by reason of their heirship become plaintiffs in a suit against the legal representatives of the grantor, are not disqualified by the fact that the grantor is dead, from testifying in relation to the execution of the deed. They are not original parties to the cause of action, and hence are not within the restrictions of section 4010, Revised Statutes, in relation to witnesses. *Martin v. Jones*, 23.

2. WITNESS: ONE PARTY TO A CONTRACT DEAD. When the maker of a note is dead, the payee is not a competent witness, on his own behalf, to prove payments made by the deceased. *Goddard v. Williamson's Administrator*, 131.

3. ATTACHMENT FOR WITNESSES. A court commits no error in refusing to issue an attachment for witnesses, where it appears that if issued it could not be served during the term, nor in refusing to await service of an attachment when the witness is too sick to be brought into court, nor where, by consent of opposing counsel, a statement of what the witness, if present, would swear to is read to the jury as his testimony. *The State v. Hatfield*, 518.

4. CONTINUANCE: WITNESS. An application for continuance on the ground of absence of a witness, is properly refused, if the adverse party will admit that a statement prepared by the party applying may be read to the jury as truly setting forth what the witness, if present, would swear. *Ib.*